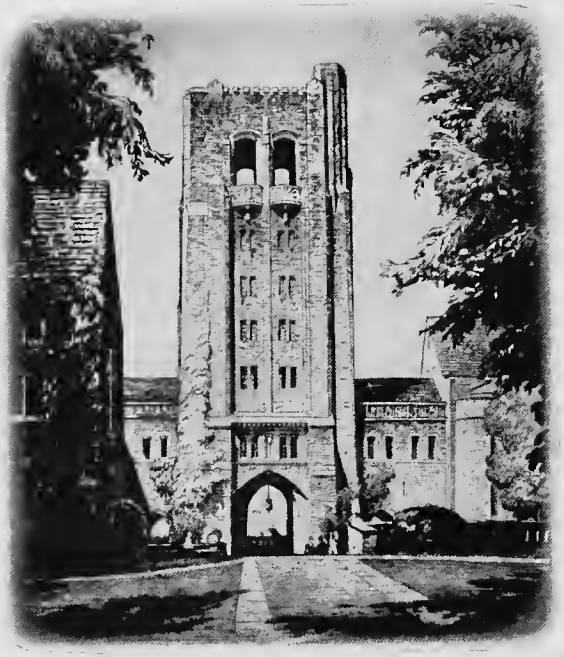

HARVARD STUDIES IN JURISPRUDENCE

VOLUME I

THE ENFORCEMENT OF DECREES IN EQUITY

BY

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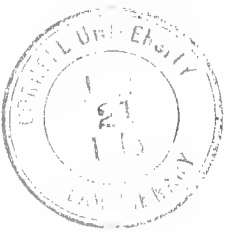

To ROSCOE POUND

THIS ESSAY IS GRATEFULLY DEDICATED

PREFATORY NOTE

THIS essay is written primarily to advocate an enlargement of the equity powers of American courts which will enable them to give a real effect to their decrees; for example, to transfer titles directly instead of by ordering a litigant to make the transfer. This is no innovation. Such power exists in more or less perfect form in most of the states of the Union. Its operation is not a matter of conjecture, but can be observed over a period of more than a century of practice, and in a wide variety of social conditions. But some states, and it is believed the Federal jurisdictions also, lack this power. Moreover it nowhere exists fully for all cases and its need has become more apparent to-day because of a definite trend in our legislation aiming at a restriction of the contempt process which constitutes the original, and still here and there the only, enforcing agency of our courts of equity.

But although the primary purpose of the essay is thus to urge a specific reform of happily no very extended character, the treatment given the subject has aimed at considering it in the light of its wider juristic aspects. It is regarded, in the first place, as a phase of the tendency to enlarge the remedial powers of our courts, to make their administration of relief more accurate and more effective than is possible now, where specific relief, either reparatory or preventive, is regarded as on the whole merely auxiliary to the substitutional relief of damages. And, in the second place, it is regarded as a part of the movement which has gradually attenuated the function of a trustee or other holder of the legal title to property, until to-day the beneficial owner who holds the equitable

title is all but recognized as the real owner, his rights good against all the world, subject only to a power in his representative, the holder of the legal title, to cut off his rights by a transfer to a bona fide purchaser.

Not only for the suggestion of the field of investigation traversed by this discussion but for constant inspiration during the progress of the inquiry and for unlimited generosity in concrete suggestion and criticism the author is indebted to his friend and teacher, Professor Roscoe Pound of Harvard University. And to his friend and fellow student, Professor George Luther Clark of the University of Missouri, the author wishes also to make grateful acknowledgment of his generous interest and helpful criticisms.

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CHAPTER I

THESIS AND THEORETICAL ARGUMENT

THE comparatively frequent resort during the last quarter century to the use of the injunction in labor disputes has been a principal cause of two somewhat distinct agitations for legislation both state and federal. One movement is aimed directly at a reduction of the power of courts of equity to issue injunctions in these controversies; the other proposes to deal with the situation somewhat less directly, by limiting the power of the courts to enforce their orders and decrees by means of contempt proceedings. The possible effect of legislation of this latter sort may well cause concern in view of the antiquated and often ineffective machinery for enforcing equity decrees which exists in some of our jurisdictions, including those of the Federal courts. If this legislation, with respect to contempt, results in reducing inadvertently the power of some of our equity courts to enforce decrees not connected with the debatable jurisdiction over human conduct, but designed rather to protect rights indisputably proprietary in character, these courts will be left very inadequately provided with power to render effective service in the administration of justice.

The vigor of this latter agitation is indicated by the number of bills annually submitted to our legislatures which deal with the subject of contempt. Already the common law jurisdiction of state courts in contempt proceedings has been limited in a large number of states — in one at least by

constitutional provision [1] — and the most persistent efforts in the same direction are being made in Congress at every session. Thus in the 61st Congress there were six bills presented in the first session and four in the second, while in the 62d ten bills were submitted in the first session alone. Indeed from 1896 to the present time the Judiciary Committee has at every session been called on, in some cases by special resolution of one or the other chamber, to consider proposed legislation on the subject, and the committees have several times reported favorably such bills to their own chamber.

It is not within the field of this paper to consider the proposed legislation. But it is important for its purposes to point out that the requirement of a jury trial in cases where the defendant is alleged to be guilty of contempt in refusing or neglecting to obey a decree of a court of equity — e. g. that he specifically perform a contract to convey certain land — will seriously increase the cost to a complainant of a suit for specific performance against a recalcitrant defendant, as well as delay his redress. In a word, contempt process in a very large part of its field — its use as a means not of securing the dignity of the court from insult but of securing to suitors the rights which the court has adjudged them entitled to — will be made very much more dilatory, costly, and hence ineffective.

The agitation against the use of the contempt process, except in cases of contempt committed in the presence of the court, has been definitely useful in calling attention to the inadequate nature of the machinery of enforcement pos-

[1] Okla. Constitution, Art. II, § 25: The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt. Provided, that any person accused of violating or disobeying when not in the presence or hearing of the court, or judge sitting as such, any order of restraint or injunction made or entered by any court or judge of the State, shall before penalty or punishment is imposed be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt till an opportunity to be heard is given.

sessed by some of our courts of equity. It is well for us to realize that if contempt process is to be made a still more dilatory and expensive method of securing the enforcement of a decree for the protection of property rights, then suitors in Federal courts and in some state courts may be left practically remediless in a large class of cases, often of great importance. Even in its most summary and effective form contempt process is a seriously ineffective method of enforcing a successful complainant's right. It is operative only upon the person of the defendant, and if he be contumacious or inaccessible through absence from the jurisdiction, or otherwise not amenable to the process of the court, the complainant may not be able to secure the right decreed to him, because of the inability of the court to enforce it.

In the present legislative situation, where we must face the possibility of losing much of the effectiveness of even the present methods of enforcing an equity court's decrees, it is worth while to examine the general problem of the most desirable method of making the administration of equity's remedies effective, and of how far the present situation approximates that method.

The rules of law administered in courts of equity are purely civil, but of the remedies which courts administer on their civil side, equity affords more, and often more adequate ones, than can be obtained in a court of common law. There needs no argument to establish that equity's interference by way of injunction to prevent a threatened violation of a complainant's right is the most exact method of securing the interest which the law intervenes to protect. And in the case of a violated right, where the choice lies between the substitutional remedy of compensation by way of pecuniary damages and specific relief by way of having performed a duty which was wrongfully not performed, or having undone what was wrongfully done, there is little doubt that specific

performance and reparation are superior remedies to pecuniary compensation. Compensation does not undo but tolerates the wrong done; specific relief alone restores or establishes as far as possible in the nature of things the situation contemplated by the law as just, the concrete fulfillment of the rights which have been threatened or infringed, the creation of the condition which would have existed had the right been voluntarily complied with. Unless, then, there are practical objections to the granting of specific relief by courts of law, it would seem that it should form the usual and basal remedy of a legal system.[1] But the experience of civil law countries in which this primary and typical position among remedies is occupied by specific relief shows that no far-reaching practical difficulties prevent the realization of this rearrangement of the relative importance of specific and substitutional remedies in our law. Yet, as a matter of fact, under the theory as to the powers of courts of common law which developed in the King's courts, historically in our English system specific relief was available in a very limited class of cases. Actions in which a plaintiff could recover specifically property of which he was the owner were confined to cases of real property, with the somewhat narrow addition of replevin. In detinue, although the plaintiff's success might result in the restoration to him of his chattel wrongfully detained, the restoration was at the option of a defendant who might as a substitute pay pecuniary damages. The narrow range of specific relief at law was due, in great part

[1] "Restitution in nature is chiefly due in the case of property which possesses a value of affection. But it is due in every case. The law ought to assure me everything which is mine without forcing me to accept equivalents, even though I have no particular objection to them. Without restitution in nature security is incomplete. How can we be secure as to the whole when we are secure of nothing in particular?" Bentham, *Principles of Legislation* (Hildreth's trans.) 288.

"It may be laid down as a general principle that wherever the law creates a duty it should enforce the specific fulfillment of it. What a man ought to do by a rule of law, he ought to be made to do by the force of law." Salmond, *Jurisprudence*, § 126.

at least, to the ineffectiveness of the law court's procedural method in execution.

The court was unwilling to exert pressure on the defendant to compel him to restore the specific property. Its procedural theory, as Professor Langdell has pointed out, was that the parties to an action owe no obedience to the court.[1] Hence its judgment is a mere declaration of the rights as between the parties over the subject-matter of the litigation, and its process for execution is directed to the sheriff, commanding him to realize the situation contemplated by the judgment as just; to put the plaintiff in possession of the real property adjudged to be his, or to take the personal property which he wrongfully withheld from the plaintiff and deliver it to the plaintiff. Clearly the nature of real property enabled the sheriff specifically to fulfill the first command, but the defendant might in many cases remove or secrete chattels so as to defy the sheriff's search.[2] Specific enforcement through the power of the sheriff is here, at least, relatively ineffective, and the best that the court of common-law jurisdiction could do, with its mode of execution, was to command its officer to seize what property of the defendant he could find capable of seizure, and apply it to the satisfaction of the judgment. Thus damages came to constitute the characteristic remedy of the courts of common law in practically all except the relatively narrow field of questions of the ownership of real property and the specific enforcement upon an officer of the performance of his duties by means of the extraordinary remedy of mandamus.

On the other hand, the point of view of a court of equity and its characteristic procedure bring relief by way of

[1] Langdell, *Brief Survey of Equity Jurisdiction*, Art. II, particularly 24 ff. But see Hazeltine, The Early History of English Equity, *Essays in Legal History*, 261, 269–284.

[2] Cf. 3 Blackstone, *Commentaries*, 413, 414 and also 146.

prevention and performance or reparation into the foreground of its remedies. Equity is a court of conscience. Its attention is directed primarily to the duty of the defendant, and it vindicates the right of the plaintiff through compelling the defendant to fulfill specifically his correlative duty, ordering him to do the very act he is under obligation to do, or to refrain from the very act he is under obligation not to do.

But this power to act *in personam* upon the defendant, while in many ways enlarging the ability of the court to effect redress for the plaintiff, has also constituted a limitation in other ways upon the efficiency of the court as a remedial agency. The court of law can by its judgment transfer title from the defendant to the plaintiff. In equity, under the influence of the doctrine that equity acts only *in personam*, the legal title is transferred, not by the decree of the court or other act of the court itself or its officer, but by the conveyance to be made by the party defendant.[1] Thus justice to the complainant depends on whether the defendant can be made to submit to the coercion of the court and perform its decree.

Professor Langdell has illustrated the essential difference between the modes of action of the two courts in a well known passage.[2]

> When common law courts were in the habit of entertaining suits for the partition of land the partition was made by the court itself without any act of the owners of the property whatever. The court first rendered judgment that a partition be made (*quod partitio fiat*); whereupon a writ was issued to the sheriff directing him to make a partition of the land pursuant to the judgment, and report the same to the court. When this had been done, the court rendered another and final judgment that the partition so made remain firm and stable forever (*firma et stabilis in perpetuum*); and by force of this latter judgment each party acquired the exclusive title to the share allotted to himself and

[1] See Crompton, *L'Authoritie et Jurisdiction des Courts*, 41b.

[2] Langdell, *Summary of Equity Pleading* (2d ed.) 36.

ceased to have any title to the shares allotted to the others. This power of extinguishing titles the chancellor never had nor claimed to have except when it was given to him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective; i. e. when the sale had been made he compelled the owner to execute a deed pursuant to the sale; hence, when the owner was out of the jurisdiction or labored under any incapacity, e. g. that of infancy, the chancellor was powerless. He could not even make the appointment of a new trustee effective except by compelling the old trustee or his heir, or whoever held the legal title, to convey to the new trustee. When it became the practice to resort to chancery for the partition of land, what the chancellor really did was, first to inquire and ascertain *how* the property should be divided, and then to compel the parties to divide accordingly by the execution of mutual conveyances.

To resume: it is in its provision for specific relief both preventive and remedial that a cardinal superiority of equity as a means of securing legally recognized interests is manifest. The procedure of equity is in general better adapted to securing this relief than is that of law. Equity, unlike law, does put pressure directly on the defendant to compel his obedience to its decree, and so obtain specific performance by him of his duty to the plaintiff. But while this mode of procedure is relatively more effective than that of law in securing specific relief, it is much less effective than it might be if equity were not confined to this one method. Specific execution is, of course, a part of specific relief, the final step in the process of securing it. But our courts of equity obtain specific execution of their decree only by putting pressure on the defendant to execute it himself. Even in cases where equity has undoubtedly power to effectuate its decree by action through its own officers, where questions of the transfer of titles are not involved, equity has in practice been very reluctant to exercise this power. It has clung to its historic method of securing the plaintiff's right only through the action of the defendant in voluntary or enforced compliance

with its decree. We shall investigate later the historical background of this conservatism of equity. At present we are concerned merely to point out that analytically the line between specific relief and relief by way of damages ought not to be drawn between what can be enforced by pressure put on the person who threatens or has violated the plaintiff's right and what cannot be so enforced. Such a line makes the redress of the plaintiff depend on a purely accidental limitation of procedure. The line should be drawn between what can be enforced efficiently by any power of execution practically possible to a court of law, and on the other hand what cannot be so enforced. In some situations, of course, specific relief is in the very nature of the case impossible, although the plaintiff is entitled to some redress or relief. Thus if A has contracted to sell and deliver to B a certain race horse, and through A's carelessness the horse has been injured and has died, B's only remedy is in damages. So also where A has killed B's pet dog, specific redress is impossible because the wrong of A has totally destroyed B's property right. Again, if A's negligence has merely lamed but not killed the horse, specific performance, though in some sense possible, is not an adequate fulfillment of B's right. Moreover, in some situations where specific performance or reparation is possible it cannot be enforced by a court because of the practical administrative difficulties in the way. Thus juristic experience has now led to the refusal everywhere on the part of courts to require specific performance of contracts for personal service.[1] Other examples in modern law are performance of promises of marriage or restoration of conjugal rights. But where the personal element in performance is lacking, where the thing to be done can be done by the plaintiff himself or by his employees at the expense of the defendant, or by officers of the court, there is no reason why specific

[1] Cf. Fry, *Specific Performance* (5th ed.) §§ 111–115.

redress should not be obtainable in any case where it is necessary to do complete justice. Where specific relief is the only adequate relief, and where it is obtainable by any process which a court of justice may expediently employ, whether through compulsion exercised on the person of the defendant, or by direct action of the court or its officers, or by action of the plaintiff under the supervision of the court and at the expense of the defendant, such process should be at the disposal of a court of equity, which under our Anglo-American system is usually the only court able to administer a remedy by way of specific relief.

No better statement of the principle involved can be found than in the words of that great and learned lawyer Lord St. Leonards, used in introducing one of the earliest statutes designed to enlarge thus the powers of the English Court of Chancery.

> " Whatever," said Lord St. Leonards, then Sir Edward Sugden, " was the nature of the act to be done, whenever it was decided that it should be done, then let it be the business of the court to see its own commands carried into effect." [1]

The original jurisdiction of equity — its power over the person of the defendant — is indispensable to specific relief in certain cases and most convenient in a still larger number. But there is a class of cases even more numerous where equity decrees do not require personal performance by the defendant, but where performance equally executive of the plaintiff's right can be secured through other means; and these means also should be at the disposal of a court of equity.

It is in brief the thesis of this essay that the specific relief granted by courts of equity should be made effective by an enlargement of the means of the court to execute it. That where " natural execution," to use the civil-law phrase, will

[1] 32 Hansard 374.

be more effective in realizing the plaintiff's right it should displace execution by contempt process. To illustrate: where a suit has been brought for the specific performance of a contract to convey land or for the removal of a cloud from the title to property, or for the establishment of a lost or destroyed deed or other instrument in writing, or for the cancellation of an instrument or of a judgment inequitably obtained, or for the establishment or proof of a deed or other instrument not properly proved or acknowledged, in any of these cases the court might by recording its decree directly by that act transfer the title involved or cancel the wrongfully obtained or controlled instrument or judgment. Or where further acts are necessary or advisable to complete the remedy to the plaintiff, the court might appoint a representative of the court to perform them at the cost of the defendant, and under a provision that any act lawfully done by such representative shall be as efficient for all purposes as if done by the defendant.

CHAPTER II

STATE OF ANGLO-AMERICAN LAW

§1. Existing Legislation

Statutes providing means of giving a real operation to the decrees of a court of equity in certain cases exist in most of the states of the Union as well as in England. The English statute was the chief if not the only reform which resulted from the great Royal Commission appointed in 1826 to inquire into the practice of Chancery. The Commission was presided over by Lord Eldon, the Lord Chancellor; and among its members were Lord Redesdale; Lord Gifford, the Master of the Rolls; Sir John Leach, the Vice Chancellor; and other distinguished Chancery lawyers. Their recommendations were markedly conservative, but on the matter under discussion they used unwonted vigor and directness in characterizing the inefficacy of contempt process to secure justice against a contumacious defendant.[1] Their discussion runs:

> A difficulty has been sometimes experienced amounting to a failure of justice, from the contumacy of a party who refuses to obey a decree or order directing him to execute some instrument, thereby depriving his adversary of the benefit which he is entitled to derive from the judgment of the court. We propose that a power shall be vested in the court which will remedy this evil; and we also recommend some alleviation in the process for obtaining possession of land when a party has obtained a decree or order for that purpose.[2]

The recommendation of the Commission was as follows:

> Proposition 155.[3] That where a person is in prison for disobedience of an order of the court directing him to execute some deed or other

[1] *Report of Royal Commission on Chancery Practice*, I, 8.
[2] *Ibid.*, 34. [3] *Ibid.*, 61.

instrument, there the court upon motion or petition supported by an affidavit that such person upon application duly made to him, after he had been not less than one week in custody has again refused to obey such order shall, if it think fit, authorize one of the Masters of the court to execute such deed or other instrument, for and in the name of such person, and the Master so executing the same shall note under the name of the party so signed by him that such deed or other instrument was executed by him in pursuance of authority given to him by the said order, and a copy of such order shall be endorsed on the said deed or other instrument, and execution of the said deed or other instrument by said Master shall in all respects have the same force and validity as if the same had been executed by the party himself; and inasmuch as the order of the court directing the execution of such deed or other instrument may be appealed from, such deed or other instrument shall, after the same is executed, be impounded with the Master until the further order of the court; and on the day of its execution notice thereof shall be given by the adverse solicitor to the party in whose name the same is so executed, who upon application to the court and payment or tender of the costs of his contempt shall thereupon be discharged from custody.

The Commission appended to its recommendations an explanatory paper by the learned Mr. Beames, who on the proposition just cited made the following comment:[1]

If the court directs a party to execute a deed or instrument and such party contumaciously refuses to do it, such refusal ought not to be suffered to defeat the ends of justice, but the court ought to be invested with a power of giving full and entire effect to its own orders, of directing one of its own officers to execute such deed or instrument, which when so executed ought to have the same force and validity as if the party himself had executed it. The principle of this provision is not now for the first time attempted to be acted upon. The Bankrupt Act[2] enables the Lord Chancellor in given events to order the bankrupt to join in any conveyance of his estate and if he refuses so to join the bankrupt is estopped from objecting to such conveyance, and is as effectually barred by the order as if the conveyance had been executed by him.

[1] *Ibid.*, 107.

[2] 6 George IV, c. 16, § 78.

It is perhaps noteworthy that the most persuasive reason for the English legislation seems to be the contumacy of defendants rather than the frequent impossibility of reaching them with the process of the court, the reason which weighs most heavily in our American jurisdictions.

The agitation against the use of contempt process by courts of equity to secure the appearance of parties and the performance of decrees had begun in Parliament at least as early as 1810.[1] It was one of the chief reasons for the appointment of the Commission of 1826. When the bill to incorporate into law the recommendations of the Commission was introduced in the House of Commons, February 11, 1830, by Sir Edward Sugden, the Solicitor General, his remarks in introducing the measure showed that he appreciated both the nature of the change his bill contemplated and the real basis of its justification. He said:

> The House would be aware that courts of equity acted *ad personam* and not *ad rem* and in all cases an appearance was necessary. Hence he proposed to enable a party to enter an appearance for a person who would not enter it for himself; if it were not done within a reasonable time by the defendant himself it should be done for him, and the jailor authorized to release the individual in contempt. The object of imprisonment was to get a certain act performed, and as soon as it was performed either by the defendant or others the object was answered. . . . There was another reform he meant to introduce, which was this: that whenever any man was ordered to execute a deed, and that he did not immediately comply, the court instead of imprisoning him should execute the deed for him; and whenever it was proper for any man to do any act it should not be necessary to confine him for the remainder of his life but the court should proceed at once as if the thing were done. . . . Whatever was the nature of the act to be done, whenever it was decided that it should be done then let it be the business of the court to see its own commands carried into effect.

He went on to show by returns made as to the imprisonments in the Fleet that imprisonment was frequently quite

[1] 35 Hansard 183.

unsuccessful as a means of procuring the performance of the commands of the court, which after all was the thing to be aimed at.[1]

The introduction of the bill was followed by an acrimonious debate in which Joseph Hume made a bitter attack on Lord Eldon for twenty-five years of what would now be called stand-pattism in the matter of Chancery reform. But even Hume had nothing but praise for Sugden's measure, and in this he was joined by such another Radical as Daniel O'Connell.

In the House of Lords the bill was introduced by the Lord Chancellor, and apparently met with no opposition. Sugden had stated as the object of the bill the amendment of the law relating to process of contempt and commitments for contempt by courts of equity, and this fairly describes the bill as it became law July 16, 1830. The section with which we are particularly concerned is number xv and subsection 15 thereof, and is in effect an incorporation of the recommendation of the Royal Commission already quoted.

But even before the passing of the English Contempts Act several American jurisdictions had recognized the need of real process to supplement process directed against the person of a defendant. It may perhaps be conjectured that not merely the possibility of dogged contumacy on the part of such sturdy individualists as our forefathers of the first years of the Republic, but even more the ease with which contempt process could be evaded not only in the wilds of a frontier state but also by the simple change of residence into another jurisdiction speaking the same language and differing from the former only geographically — a change easier to people of pioneer habits than to the conservative English — brought home to the early legislators the need for such enactments. At any rate, even before the opening of the nineteenth cen-

[1] 32 Hansard 374 *et seq.*

tury Maryland (1785) and New Jersey (1799), and in its first decade Tennessee (1801), Connecticut (1807), and Ohio (1810) enacted statutes to give to their courts administering equity the right to transfer titles directly by the decree they rendered. The earliest statute of all seems to have been that of Maryland in 1785. In an act for enlarging the powers of Chancery, sec. xiii reads:

> And be it enacted: That in all cases where a decree of the Chancellor shall be made for a conveyance, release, or acquittance, and the party against whom such decree shall pass shall refuse or neglect to comply therewith, such decree shall stand, to be considered and taken in all courts of law and equity to have the same operation and effect as if the conveyance, release, or acquittance had been executed conformably to such decree.

It is the language of this statute which seems to have been the model for many of the state statutes. Apart from this form it is hard to trace any type statute.[1]

The law of Tennessee discloses an interesting evolution. As early as 1782, in the organization of the courts of North Carolina, of which Tennessee was then a part, it was enacted that:

> Each superior court of law in this state shall also be and act as a court of equity for the same district.[2]

In 1787 a statute was passed to permit service on absentee defendants by publication, the preamble being in these significant words:

> Whereas persons have sometimes withdrawn themselves beyond the limits of the state or otherwise have absconded to avoid appearing in courts of equity; and whereas no means have been provided to cite persons residing beyond the limits of the state to appear in said courts; for the remedy of the inconvenience thence arising . . . etc.[3]

[1] Ala., Ark., Kans. Cf. Miss., Mo., Nebr., N. J., Vt., Wash.
[2] Scott, *Laws of Tenn.*, 261.
[3] Scott, 389.

Finally, November 2, 1801, the procedure of chancery in the new State of Tennessee was provided for thus:

> Instead of decreeing parties to convey lands as heretofore practiced in Equity the said court shall have power by decrees respecting titles to divest thereby (without conveyance from the party) the property of the person or persons against whom a decree shall be made, under such conditions and limitations as may therein be expressed: Provided always that copies of such decrees shall be recorded in the register's office of the county where the land lies, agreeably to the law in force respecting the register of deeds.[1]

The development of the Connecticut law is also interesting and furnishes a parallel to that of Tennessee. The revision of the Connecticut Laws of 1784 introduced into its laws as to equity provisions authorizing a guardian of a minor ward to make a conveyance of any real estate of his ward which had been decreed by the court having cognizance of the same to be conveyed, and providing that a conveyance so made should be good and effectual at law. Further, in case the minor had no guardian at the time of the bringing of the suit for conveyance, the court might appoint one with power to carry the decree of the court into effect.

Then in May, 1807, it was enacted:

> That the courts of Chancery in this state in every case wherein they have jurisdiction, and in their judgment they cannot otherwise effectuate their decree, be, and they are hereby authorized to pass the title to real estate by decree and without any act to be done on the part of the respondent or respondents and that such decree so long as the same shall remain in force, the same having been first recorded in the records of the town wherein the land lies, shall be as effectual as if the said real estate were granted by deed of the respondent or respondents in the usual manner.

There are to-day two types of statute giving to courts of equity permission to act *in rem*. One of these provides that

[1] Roulestone's *Laws*, 1792–1795, 246.

where a decree has been made for the execution of a conveyance or other instrument by a defendant, and a failure on his part to comply with the decree has occurred, the court may appoint a master to make the conveyance or other instrument, and that this instrument so executed shall have precisely the force and effect of one executed by the defendant. The other type provides that in case of a failure on the part of the defendant to perform as decreed after a certain lapse of time the decree recorded shall itself operate to transfer title. It is obvious from the statutes already discussed that the American type is the second of the two. This is the form of all three of the pioneer statutes discussed, and of their near contemporaries the Ohio and New Jersey statutes.

Two early statutes, however, Kentucky in 1808[1] and Virginia in 1818,[2] adopted the method of appointing an officer of the court to make the conveyance. They had, however, no imitators until after the English legislation of 1830; and the provisions by which in 1837 Connecticut and Tennessee enlarged their locally invented remedy so as to allow a conveyance by a commissioner or master under the direction of the court, as well as the Illinois statute of 1845[3] adopting the single method of conveyance by a commissioner, seem to derive from the English statute, or at least to have been influenced by it. In the meantime Mississippi (1821),[4] Missouri (1835),[5] and Alabama (1841)[6] adopted the American plan, which now prevails in twenty-seven states and territories. Kentucky has enlarged her statute by allowing the decree to act as a conveyance, and the double remedy now prevails in Alabama, Indiana, Iowa, Kentucky, and Nebraska, and to a certain extent in Maryland. Three of

[1] 3 Little's *Laws*, 460.
[2] R. C. 1818, 204.
[3] Ill. R. S. 1845, 98.
[4] R. C. 1824, 92.
[5] Mo. Laws, 1835, Act of March 7, §§ 7 and 8.
[6] Ala. 1841, Clay Dig., 354, § 57.

the most recent statutes rather curiously adopt conveyance by an officer or appointee of the court as the sole method. These are Rhode Island (1881),[1] Colorado (1887)[2], and Pennsylvania (1901).[3] The New York statute, a part of the Code of Civil Procedure in its present form, also effects the transfer by the action of a court officer, the sheriff. This statute is discussed specially later.[4]

One may conjecture that the closer association of the courts of law and equity in the American jurisdictions, an association which, even when separate courts were constituted, was much more intimate than in England, where even the chancery and common-law bars were thoroughly distinct, led to the more general and earlier adoption of the directer method so obviously suggested by the common-law judgment. In the English type of statute the adherence to the form of acting through a person not only marks the tenacity of the historical conception of the limits of equity jurisdiction, but also the line of development by way of the earlier statutes, whereby a court of equity was empowered to substitute a new trustee for a trustee who was an infant or was *non compos mentis*.[5]

The American form of statute presents the advantages of simplicity, directness, and celerity of operation. A statute which provides that the decree when recorded shall itself be equivalent to a conveyance has the advantage of at once clearing up the record and preventing the double search that will be necessary when a deed appears on the register of deeds and an injunction against asserting the clouding claim is on the record of the court only. Moreover, in some cases, e. g. where the plaintiff's title is by adverse possession,[6] the mere cancellation of an outstanding claim will not give him

[1] Acts and Resolves, 1881, 110. [2] Laws 1887, 254, § 1.
[3] Publ. Laws, c. 83 (10th April 1901) § 1.
[4] See *post*, p. 21. [5] See *post*, p. 85.
[6] Cf. Arrington *v.* Liscom, (1868) 34 Cal. 365.

a marketable title; but a recorded deed under the statute would serve this end as well as remove the cloud.

As a matter of fact, it was not very long until England added the directer method also, by its plan of "vesting orders," through which the court is empowered in a great variety of cases to vest the property in dispute in the successful litigant just as effectively as if the person decreed to execute the conveyance or release had been of full capacity and had obeyed the decree.[1] At present the English legislation furnishes a model worthy of imitation both in the extent to which it applies the principle of allowing to the equitable decree of the courts a real effect and in the wide discretion it gives to the courts in the use of this added power.[2]

During the nineteenth century legislation in almost all the states of the Union made some effort to enlarge the power of equity by giving a real effect to its decrees. The provisions, with the date of their earliest appearance on the statute books, are collected in an appendix. Some comment upon them may be permitted here. It seems that even to-day New Hampshire, New Mexico, and South Carolina rely on process *in personam* against the defendant to secure the execution of decrees of equity commanding the performance of acts other than the payment of money. So far as statutory provision goes Nevada seems to be in the same position, but the Nevada court in the case of Robinson *v.* Kind [3] held that an action to cancel as obtained by fraud a trust deed of Nevada land was an action substantially *in rem*, as having for its object to reach and dispose of real property within the state, and that no other than two existing Nevada statutes, one establishing a local venue for actions concerning real prop-

[1] Act to extend the provisions of the Trustee Act, 15 & 16 Vict., c. 55; and cf. Trustee Act, 56 & 57 Vict., c. 53, §§ 26–35.

[2] *Ibid.*, and Supreme Court of Judicature Act, 47 & 48 Vict., c. 61, §§ 14, 24.

[3] 23 Nev. 330.

erty and one authorizing service by publication upon non-residents, were necessary to enable a state court to render a decree against non-resident defendants which should operate to annul the deed complained of, and also to vest the title in the property in the plaintiff.

The position of the legislation of California and Idaho as compared with Montana and New York affords an interesting sidelight on the methods of American legislation. The relevant New York statute is a part of the Code of Civil Procedure.[1] It is an amendment of the original section of the Code of 1848. In its first form the Code provided merely that a court which had, under certain circumstances, required a deposit in court of money or other personal property capable of delivery might, if the order for the deposit were disobeyed, besides punishing for contempt, direct the sheriff to take the money or other thing and deposit or deliver it in conformity with the direction of the court. In 1851, however, the Code sections on this point were amended to include a provision that where the court had directed a conveyance of real property, if this order were disobeyed the court might then order the sheriff to convey the real property in conformity with the direction of the court. As is well known, several other states adopted the Code of Civil Procedure as their own. But the Practice Act of California in 1851 came so close on the heels of the New York legislation that it adopted the original rather than the amended form, and this original clause was re-enacted, still without amendment, in the California Code of Civil Procedure of 1872, as § 574. Section 572 had provided, following the New York Code of 1848, for the cases in which the courts might order a deposit of money or personal property to be made. The California Code of Civil Procedure was the model on which Idaho and Nevada framed their codes of procedure, and the

[1] § 718.

Idaho Code (1881) contains provisions [1] as to deposits quite like the two of California — § 572 and § 574. But Nevada re-enacts § 572 only and omits entirely any provision as to enforcement of the orders by the sheriff. Montana, on the other hand, in 1895, followed the amended form of the New York Code, which authorizes conveyances by the sheriff. The Dakotas, while following the California and New York codes very closely in the main, have enacted independent legislation on this point.

California and Idaho have, however, in some measure supplied the lack of a comprehensive statute by another provision of their codes which authorizes actions to quiet titles, and this provision as interpreted by their courts enables a court which decides a case of adverse claims to estates or interests in real property to establish the title in the successful claimant, either directly by the decree or by ordering a commissioner to convey to him.[2] But the California court has gone even beyond this liberal interpretation of the statute, and claims authority on general equitable principles to give a real effect to its judgments as to property either real or personal. Thus Rourke *v.* McLaughlin,[3] held that a court having jurisdiction over the parties or the subject-matter of the suit could decree specific performance of a contract to convey. The contract involved was for the sale of California land, and it was urged that as the vendor was a resident of Ireland he could not be compelled to execute a conveyance. But the court said his absence would not prevent a California court from compelling a deed to be given by him himself or by a commissioner appointed to act

[1] §§ 4339–4341.

[2] Cal. Code Civ. Proc. § 738; Perkins *v.* Wakeham, (1890) 86 Cal. 580; Kittelle *v.* Bellegarde, (1890) 86 Cal. 564; Sullivan *v.* Lumsden, (1897) 118 Cal. 664; Jones *v.* Jones, (1903) 140 Cal. 587.

[3] (1869) 38 Cal. 196. Cf. also Hidden *v.* Jordan, (1881) 57 Cal. 184; Dyer *v.* Leach, (1891) 91 Cal. 191. The case of Scadden Flat, etc., Co. *v.* Scadden, (1898) 121 Cal. 23, 41 relies on C. C. P. § 187, q. v. in App.

in his place. This decision was quoted and relied upon in the recent case of Wait *v.* Kern River Co.[1] in which the court, without any attempt to base its position on a statute, decides that it has power to convey by its decree title to certain shares of stock having a *situs* in California to a claimant against one held to be a constructive trustee of the shares, although this trustee was a non-resident and served by publication only. The court described the action as:

> Action for specific performance against a party who is a non-resident and cannot be personally served, in a case where the whole subject-matter of the case is within this State and nothing remains to be done but to compel a transfer thereof. While it is well settled that a decree for specific performance of a contract operates primarily *in personam*, yet in a limited and qualified sense it may also be said to operate *in rem* when the property to be transferred under the contract is within the jurisdiction of the court but the defendant is absent therefrom (26 A. & E., 132). Where the whole relief sought consists in the mere delivery of property within the jurisdiction of the courts of a state to a party entitled thereto, under a contract, the proceeding is in a sense one *in rem* — sufficiently so, in our judgment, to give such courts jurisdiction to effectuate delivery against a non-resident defendant.

This practical disregard of a lack of statutory authority to proceed *in rem*, and the definite assertion that the nature of the right enforced makes the jurisdiction a jurisdiction *in rem* is not without parallels in other courts, and is highly significant of the direction in which the law as to equitable rights is moving.

California, then, and Nevada, and in all probability Idaho as well, eke out defective statutes by alleged interpretation or by asserting a power in equity independent of statute to give a real effect to its decrees.

In several other states the scope of the legislation is unnecessarily narrow. Thus in Delaware it is confined to cases of trusts. Massachusetts has no single comprehensive

[1] (1909) 157 Cal. 16.

statute, but covers parts of the field by three different pieces of legislation: one as to conveyances by an executor or guardian;[1] one confined by its terms to trusts[2] but very liberally interpreted,[3] and one as to quieting title.[4] A large number of statutes are confined by their terms to decrees as to real property, although there is no good reason why decrees as to other property should not have the benefit of the statute. Some statutes have been construed as not even covering all cases of decrees as to real property;[5] and the phrasing of a number is now becoming obsolete.[6] Moreover, the statutes vary widely in the language in which they are expressed, and in the fullness of detail they employ in specifying the cases in which the decrees will be given real effect. All these differences are to be expected in statutes ranging in date from 1785 to 1901, and a fourth of them more than half a century old.

But this variety not only of drafting but also of experience under these different acts — an experience obtained in a great range of social and political conditions and over a long period — should furnish an unusually good basis for the construction of a uniform statute, modern in phraseology and ample in extent of applicability.

§ 2. Enforcement of Decrees in the Federal Courts

The situation in the Federal courts requires special treatment. The statutory provisions material in the discussion are §§ 267, 268, and 57 of the new Judicial Code (substantially §§ 723 and 725 R. S.), Act of March 3, 1875, § 8, and

[1] R. L., c. 148, § 1. [2] R. L., c. 147, § 17.

[3] Cf. p. 60 and also Short *v.* Caldwell, (1891) 155 Mass. 57.

[4] R. L., c. 182, §§ 6–10.

[5] Tex. statute discussed p. 61 *infra*. and cf. statutes of Ind. and Ia.

[6] See Maryland statute of 1785 and statutes in whole or part using the same phraseology cited pp. 17 and 18 *supra*.

§§ 913, 917, and 918 R. S., not embodied in the Judicial Code but not expressly repealed thereby.[1] To these, by virtue of the powers granted in the last three sections, should be added the newly promulgated Equity Rules, and in particular Rules 7 and 8.

The doctrine of the Federal courts as to their jurisdiction in equity has always been most strict.

> Original jurisdiction in equity has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the Court of Chancery in England which administered equity at the time of the emigration of our ancestors and down to the Constitution.[2]

This jurisdiction is uniform throughout the states and unaffected by state laws. This was early laid down by Marshall and received classic statement by Story in Boyle *v.* Zacharie.[3]

> The Chancery jurisdiction given by the Constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction the courts of the United States are not governed by the state practice; but the Act of Congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules, and usages which belong to courts of equity as distinguished from courts of law; subject of course to the provisions of the Acts of Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts the courts of the United States may from time to time prescribe.[4]

Likewise in Noonan *v.* Lee[5] Judge Swayne said:

> The Equity jurisdiction of the United States is derived from the Constitution and laws of the United States. Their powers and rules

[1] See § 297 of the Judicial Code.
[2] United States *v.* Howland, (1819) 4 Wheat. 108, 115.
[3] (1832) 6 Peters, 635, 657–58.
[4] Cf. also per Todd, J., in Robinson *v.* Campbell, (1818) 3 Wheat. 212, 222.
[5] (1862) 2 Black 499, 509.

of decision are the same in all the states. Their practice is regulated by themselves, and by rules established by the Supreme Court. This Court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation.

It is frequently said that an exception to this doctrine exists in the fact that an enlargement of equitable rights by the statutes will be administered by the Federal courts. In the language of the leading case, the court, speaking by Mr. Justice Bradley, said:

Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State.[1]

There is no doubt of the entire soundness of this doctrine as frequently set forth by the United States Supreme Court. But it does not constitute any exception to the general doctrine that the equity jurisdiction of the Federal courts is derived solely from the Federal Government and is national in character. A Federal court is not a foreigner within the state in which it exercises its powers. In a large part of its work its jurisdiction is concurrent with the courts of the states. It finds its rules of decision, in cases which do not arise under the Constitution of the United States or the laws of Congress, in the local law of the state which created the right asserted.

Every citizen of a State is a subject of two distinct sovereignties having concurrent jurisdiction in the State — concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under

[1] Case of Broderick's Will, (1874) 21 Wall. 503.

State laws may be prosecuted in the State courts, and also, if the parties reside in different states, in the Federal courts.[1]

Now the jurisdiction which the Federal court has over the right created by the state law, its capacity for exercising the powers of a court of equity upon the right, comes entirely from the Federal law. The right may be new, newly created by a local statute, and existing in no other state in the Union, but that is immaterial on the point of jurisdiction. If it comes within those powers of a court of chancery which the Federal Government has bestowed upon its courts, they will enforce it. The right may originate under the local law, but the jurisdiction of the court over it is derived from the Federal law.[2]

The rights, then, which a court of equity may protect by its appropriate remedies are often created and regulated by state laws. But the remedies by which these rights are protected are wholly the creatures of the Constitution and laws of the United States. They are uncontrolled by the practice of the state courts.[3]

But in spite of this the United States Supreme Court as well as other Federal courts have more than once upheld the exercise by Federal courts of a power to convey legal title by their decrees in equity on the strength of a state statute giving such power to the state court having jurisdiction in the territory in which the property in litigation was situated. Probably the leading case is Clark *v.* Smith.[4] Here a bill to remove a cloud from title was brought in the Circuit Court of the United States for the District of Kentucky. The

[1] Bradley, J., in Claflin *v.* Houseman, (1876) 93 U. S. 130, 136.

[2] See Lorman *v.* Clarke, (1841) 2 McLean 568, an excellent discussion of the whole matter of the equity jurisdiction in U. S. courts. See also Miller *v.* Sherry, (1864) 2 Wall. 237, 249.

[3] See Gormly *v.* Clark, (Fuller, C. J.) (1890) 134 U. S. 338, 348; Bardon *v.* Land & River Improvement Co., (1894) 157 U. S. 327, 330.

[4] (1839) 13 Peters 195.

complainant was in possession of the property and held the legal and equitable title to it. But the defendant was claiming the land by virtue of a patent from the state. The bill asked that the defendant be compelled to release his claim, and that a conveyance be decreed under the provisions of the state statute. The statutory provision as to what should constitute clouds on title which could be removed in equity applied to the case, but the judges of the Circuit Court, being divided in their opinion on the question of the jurisdiction of that court to compel the defendant to execute the conveyance prayed for, dismissed the bill. The complainant appealed to the Supreme Court, and it held that the Circuit Court had this power.

The court said:

> The legislature having declared that he who has the legal and equitable title and the possession may treat the adverse claimant as a trustee and coerce a release to himself of the inferior claim, of course the statute secures a highly valuable right which it was the duty of the courts to enforce, and which can only be enforced in a court of equity.
>
> Kentucky has the undoubted power to regulate and protect individual rights to her soil and to declare what shall form clouds on titles; and having so declared the courts of the United States by removing such clouds are only applying an old practice to a new equity created by the legislature.
>
> Where the legislature declares certain instruments illegal and void . . . there is inherent in courts of equity a jurisdiction to order them to be delivered up and thereby give effect to the policy of the legislature.

To this reasoning there can be no objection. The Federal courts must and do recognize the power of the state to regulate the tenure of property within its limits, and the mode of its acquisition and transfer.[1] The Federal court must, in

[1] Arndt *v.* Griggs, (1889) 134 U. S. 316, 320; U. S. *v.* Fox, (1876) 94 U. S. 315, 320.

the exercise of its concurrent jurisdiction, enforce this state-created right — but by its own remedies.[1]

But the Supreme Court went further, and urged that the Circuit Court had authority under the statute not only to decree a conveyance and to enforce it by the process provided by Congress for the enforcement of decrees of Federal courts, but also to make the transfer of title directly, as a Kentucky court could have done. Justice Catron said:

> The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in courts of the United States; but having created a right and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the State courts; on the contrary, propriety and convenience suggest that the practice should not materially differ, where titles to land are the subject of investigation. And such is the constant course of the Federal courts. For instance, in Tennessee the legislature has provided that the courts of equity may divest a title and vest it in another party to the suit; and that the decree shall operate as a legal conveyance. So in Kentucky the legislature has declared that the courts may appoint a commissioner to convey as the attorney in fact of a litigant party; and that such deed shall pass the title: in both instances binding infants and femes covert if necessary. *The Federal courts in the states referred to have adopted the same practice for many years, without a doubt having been entertained of its propriety.*[2] It may be said with truth that this is a mode of conveyance and of passing title which the states have the exclusive power to regulate; still the same statute that conferred the power thus to decree a conveyance prescribed the mode of proceeding; and had the form of the remedy been rejected by the courts of the United States the right to have such record conveyance would have fallen with it, as they could not be separated.

The doctrine that the Federal courts can use the enforcing machinery provided for state courts by a state statute

[1] That the enforcement of a decree in equity is remedial process see the opinion of Garrison, V. C., in Bullock *v.* Bullock, (1894) 52 N. J. Eq. 561, 570.

[2] Italics supplied by the author.

received additional and even more direct confirmation in the case of Langdon *v.* Sherwood.[1] In an ejectment suit the plaintiff relied for title on a decree of a Nebraska court under the state statute[2] which provided that the decree itself should operate as a conveyance in case the defendant failed to comply with the decree within a certain time. The defendant in the suit in the state court had never made a conveyance, and it was now contended that the plaintiff had therefore never received the legal title, but only an equitable one, and the quieting of that title against the defendant in the Nebraska suit. The court upheld the plaintiff's title.

Justice Miller, speaking for the court, said:

> It was undoubtedly the ancient and usual course in such a proceeding to compel the party who should convey to perform the decree of the court by fine and imprisonment for refusing to do so. But inasmuch as this was a troublesome and expensive mode of compelling the transfer, and the party might not be within reach of the process of the court, so that he could not be attached, it has long been the practice of many of the states under statutes enacted for that purpose to attain this object, either by the appointment of a special commissioner who should convey in the name of the party ordered to convey, or by statutes similar to the one under consideration, by which the judgment or decree of the court was made to stand as such conveyance on the failure of the party ordered to convey. The validity of these statutes has never been questioned so far as we know, though long in existence in nearly all the states of the Union. There can be no doubt of their efficacy in transferring the title in the courts of the states which have enacted them; *nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power.*[3]
>
> The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the state in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the control of the legislature of the state and as the case in hand goes upon the proposition that the title had passed

[1] (1888) 124 U. S. 74.

[2] Code, § 429.

[3] Italics supplied by the author.

from the government of the United States and was in controversy between private citizens, there can be no valid objection to this mode of enforcing the contract for conveyance between them according to the law of Nebraska (citing cases). We cannot see, therefore, any error in the circuit court in permitting the proceedings in the chancery suit to be given in evidence, nor in giving them the effect of transferring from the Santee Land, &c. Co. (the Nebraska defendant) such legal title as it had to any of the property in controversy.

An additional example of this position in the Federal courts is furnished by the case of Single *v.* Scott Paper Mfg. Co.[1] This was a case in the Circuit Court of the United States for the Northern District of Ohio, Western Division. It was a suit by Single, a non-resident, against the Scott Paper Co. and others, also non-residents, to enforce specific performance of a contract to convey real estate lying within the jurisdiction of the court. A motion was made to dismiss the bill for want of jurisdiction, and this was denied. The court relied on R. S. 738 to give it jurisdiction, since the statute of Ohio[2] provided a real effect to a judgment decreeing specific performance of a contract concerning land within the jurisdiction of the court. It then proceeded to discuss the remedy it was entitled to grant, and concluded:

If the complainant shall establish the allegations of his bill by proper evidence, and show that the contract set forth was properly executed by persons duly authorized, and that he is entitled to a specific execution of said contract, this court will have jurisdiction to order the defendants within a time named to make such conveyance. If they fail to do so, and are beyond the jurisdiction of the court so that personal enforcement of the order will be impossible, the decree may provide that on a failure on their part to comply with the order of the court, the decree in and by itself may divest the defendants of all title in said property and vest the same in the complainant. The equities of the case, so far as the allegations of the bill are concerned, are all with the complainant. It presents a case where the court ought to retain jurisdiction if it can rightfully do so, because the relief sought

[1] (1893) 55 Fed. 553.

[2] R. S. 5318.

is just and equitable in the highest degree. I am therefore of the opinion that this court has jurisdiction over the property involved in this controversy, and over the defendants so far as they have any claim or title to said property; that this proceeding is substantially a proceeding *in rem*; and that the general powers conferred upon this court as a court of equity under the Constitution and laws of the United States are so enlarged and made more effective, by the statutes of the State of Ohio, as that upon final hearing if the complainant shall establish his right to relief, full and adequate protection can be given him to enforce the specific execution of the contract set out in his bill.

Finally, in Deck *v.* Whitman,[1] the question was considered with great fullness in view of a doubt which had been cast on the right of Federal courts to exercise the power of passing title by decrees on their equity side under the statutes of Tennessee. The defects of the procedure *in personam* were forcibly pointed out, as well as the advantages of giving a real effect to the decree of the court. There is an extended discussion of the authorities and an argument from the Federal legislation which will be considered shortly. The court pronounces strongly in favor of the view that it is the right and duty of Federal courts to avail themselves of the local law allowing the decree of a court of equity to divest and vest title.

These cases fairly represent the position of the Federal courts. They assert with some definiteness a power to avail themselves of a remedy which state legislatures have put into the possession of their local courts. A distinction might have been made between statutes of what I have called the American type, in which the decree of the court itself operates to transfer the title, and those of the English type, in which the statute authorizes the court to direct one of its officers to execute a deed by which the title shall be transferred. It might have been said that in the former case it was the state law that operated upon the Federal decree

[1] (1899) 96 Fed. 873.

to transfer the title to land within the limits of the state — that no new remedy here was being utilized by the Federal court. But this could not be applied to the case where the court has itself to act through its officer. Certainly it could not be said that the state statute empowered a Federal court's Master in Chancery to make a deed to transfer title to land within the state. But at any rate no such distinction is made by the courts in the cases discussed. In Clark *v.* Smith,[1] for example, the practice of Federal courts in Kentucky and Tennessee to avail themselves of the state statutes of the respective states to transfer titles were alike approved. But the statute in Kentucky required execution by a commissioner, while that in Tennessee gave the real effect to the decree itself.

There is a rather noticeable lack of affirmative argument for the power claimed. What is chiefly emphasized is the long-continued exercise of it without question, and the desirability of so direct and adequate a remedy as it affords. Such reliance as is placed on authority is of two sorts. Some cases cited are cases where a Federal court of equity enforced a substantial right created by a state law — for example the Illinois law giving to a mortgagor of real estate the privilege, within a year of foreclosure, and to his judgment creditors within three months thereafter, of redeeming the premises. This, as Justice Harlan said in Connecticut Mutual Life Insurance Company *v.* Cushman [2] (one of the cases cited by the court in Langdon *v.* Sherwood), is a substantial right and constitutes a rule of property to which the circuit court must conform. Such were the cases of Brine *v.* Ins. Co.[3] and Conn. Co. *v.* Cushman. These cases are not authority for the proposition that a state statute can empower a Federal court to exercise a new remedy hitherto unknown to equity,

[1] (1839) 13 Peters 195.
[2] (1882) 108 U. S. 51.
[3] (1877) 96 U. S. 627.

and moreover one which it required statutory enactment to enable the state courts to exercise. The other cases merely affirm the well-established principle that it is for the state to regulate the mode of acquisition and transfer of property within its limits.

A new argument is tentatively advanced in Deck *v.* Whitman,[1] based on the Federal Statute, Act March 3, 1875, § 8 (substantially re-enacted as § 57 of the new Judicial Code), which enables a court of the United States to take jurisdiction in suits brought to enforce equitable claims on real or personal property within the jurisdiction if absent defendants are properly notified to appear.[2] It is asked what effect could this statute have if Federal courts were not allowed to avail themselves of the state statutes which give to state courts of equity the right to transfer title. The answer is that the Federal statute gives to Federal courts of equity the right upon giving notice to non-resident parties by publication to determine the *equitable* rights of these parties as to a *res* within the jurisdiction of the court. Thus if the claim in litigation was on a contract for the conveyance of land in Ohio by a resident of Ontario, the Ohio Federal court under the statute could upon proof of proper

[1] (1899) 96 Fed. 873, 889–890.

[2] . . . "That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien thereupon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant thereof or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated . . (provision for methods of notice by publication and in event of failure of defendant to respond) . . . it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district . . ."

publication of notice decree that the non-resident should convey to the complainant, and use its power of sequestration of the land within its jurisdiction to put pressure on the defendant to make the conveyance decreed. Moreover, it could even put the complainant into possession of the property by a writ of assistance. But it cannot without a statute give him a legal title. And a legal title which will be readily marketable is the only complete relief.

This objection of Deck *v.* Whitman that to make the Act of March 3, 1875, § 8, other than merely nugatory it must be considered as giving Federal courts power to transfer legal title, is unsound. The statute has a definite purpose and value. It enables the court to exercise its equitable powers when the defendant has not been personally served within the jurisdiction. It grants to the complainant such remedies, by way of personal pressure on the defendant to obey the decree of the court, as are available against such property of the defendant as lies within the jurisdiction of the court. This is a genuine enlargement of the relief available. But it lacks the ultimate measure of relief *in rem*. It is noteworthy in this connection that the Supreme Court cases do not even put forth this argument from the statute, and that it is not relied on as conclusive even in Deck *v.* Whitman, or by the editor of the third edition of Pomeroy's *Equity Jurisprudence*.[1] In both it seems to be rather in the nature of a makeweight argument.

Indeed the argument from Federal legislation is strongly the other way. Congress in expressly providing that in the cases on the common-law side of the Federal courts the practice and forms and modes of proceeding should be those of the state in which the court was sitting,[2] and on the other

[1] V, 25, n. 33.

[2] R. S. § 914. "The practice, pleadings, and forms and modes of proceeding in civil causes, *other than equity and admiralty causes*, in the circuit and district courts shall conform as near as may be to the practice, pleadings, and forms and modes of

hand not only expressly excepting cases of equity and admiralty from this rule but expressly providing another for them,[1] gives the strongest possible basis for the inference that a state statute cannot enlarge the remedial powers of a Federal court of equity.

And this inference from legislation is only a support to the fundamental analytical argument that although state legislation may create new rights which a Federal court in the exercise of its concurrent jurisdiction is bound to enforce, for example as rules of property, state legislation cannot confer upon Federal courts power to grant to litigants new remedies. Certainly such an intention was not present in the minds of the legislators, who meant merely to give their own state court this additional power.[2] And it scarcely needs saying that whatever their intention, it is impossible for a state legislature to make laws to govern the procedure of a Federal court.

It may be urged that, whatever the soundness or unsoundness from an analytical point of view of the exercise of this power by Federal courts, its undoubted long-continued operation in actual practice has settled the matter, and no theoretical argument will disturb the continuance of a practice admittedly desirable. In considering this there are

proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

[1] R. S. § 913. "The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

Compare also §§ 915 and 916 with 917 and 918.

[2] Lessee of Shepherd *v.* Commissioners of Ross County, (1835) 7 Ohio 271; cf. also a good discussion in the dissenting opinion of McDowell, J., in Virginia T. & C. Steel, &c. Co. *v.* Harris, (1907) 151 Fed. 428.

three points which should be borne in mind. In the first place, the authorities in which the question has been actually raised are not numerous. The real decisions could be supported on other grounds, in the Supreme Court cases at least. In other words, the question has not yet been thoroughly ventilated, and a reversal of the practice as unwarranted is still possible and to be feared. In the second place, the present practice is of use to complainants only where state statutes have given their own courts the power to give a real effect to their decrees. But some states give no such power, and in others the power granted is regrettably narrow. The state statutes should not constitute the measure of the Federal power to grant the remedy. Finally, the doubt as to the existence of the power and the unnecessary limitations on it as found in state statutes could be removed by Federal legislation. This is the direct and desirable solution. A matter of such importance ought not longer to be left doubtful.

CHAPTER III

STATE OF THE CIVIL LAW AND DEVELOPMENT OF THE SUBJECT IN ROMAN LAW

THE history of remedies in the other great legal system of the Western world, the Roman law, affords a striking parallel to the development which our Anglo-American law has followed. Moreover it points the way to the rounding out of our common-law scheme of remedies by means of an effective enforcement of specific relief such as is here advocated.

The Romans were fortunate in the development of their law in that they escaped the dual system of courts which grew up in England as the courts of common law and chancery. In the Roman system both law and equity were administered by the same tribunals. Hence no distinction of procedure arose to mark and emphasize the administration of justice between different courts.

But, as is true of primitive systems of law generally, the remedy which the early Roman law granted was in all cases pecuniary compensation. The explanation of this phenomenon of archaic law is the fact that law originally aimed at keeping the peace by forestalling private vengeance and so averting private war. This aim it sought to accomplish by buying off vengeance. The root idea of primitive law is not compensation for injury but composition for revenge. The so-called codes of archaic systems, from the Code of Hammurabi down, consist largely of extended tariffs of pecuniary composition for injuries inflicted. With the growth of the power of the state and the consequent respect for the law which found its sanction in that power, composition

gradually became compensation. The idea of penalty grew into that of reparation. Restitution and prevention as a remedy seems in general to be a later idea in the history of legal thought.

So indeed it was in the development of Roman law. Originally the praetor gave a direction to the judex that if the plaintiff's case were established the defendant should be condemned in a sum of money. Even in cases where the plaintiff had established a claim to the restitution of specific property of which he had been wrongfully deprived, and which was in the possession of the defendant, the only thing the judex could do for him was to condemn the defendant to pay the money value of the property.[1] Though the defendant was the loser in the suit he remained in the possession of the property, and under the praetorian law when he paid the damages to which he was condemned he became its owner. Thus the plaintiff had established his right only to lose it, and receive merely a substituted right of pecuniary compensation. Obviously this was often inequitable. Any damages would frequently be an utterly inadequate reparation for the deprivation of the plaintiff. Indeed the jurists themselves recognized that in some cases, for instance the enslavement of the plaintiff's child, damages were not merely inadequate but entirely inapplicable. But specific relief, the only complete remedy for the difficulty, was only very slowly arrived at.

Two lines of remedial contrivance ameliorated the situation. In the first place, the praetor widened the scope of the direction he transmitted to the judex by somewhat

[1] Gaius, *Institutes*, IV, 48. "The *condemnatio* is always to pay a pecuniary value. Even when we claim a corporeal thing — an estate in land, a slave, a garment, an article of gold or silver — the judex condemns the defendant to deliver not the thing itself as in the elder system but its value in money." (On "as in the elder system" — *sicut olim fieri solebat* — see note, Poste's edition of Gaius, 3d ed., 507. But cf. Roby, *Roman Private Law*, II, 344 and note.)

modifying the *condemnatio* in actions called *actiones arbitrariae*. In these cases he allowed the judex to give the losing defendant an alternative; in the case of property, for example, either to restore the property in specie to the rightful owner or, failing that, to be condemned to pay the value of the property as fixed by that owner on oath before the judex.[1] In other words, the defendant was condemned in a money payment only if he should disregard the order to make specific reparation. This very device to secure specific relief was re-invented in Pennsylvania in the early part of the nineteenth century, when a court of equity with power to order specific performance did not form part of the state legal system.[2] It seems inherently probable that when the plaintiff fixed the value of his own property, even though under oath and the supervision of the judex, the amount thus assessed as damages would be sufficiently great to make the defendant in the majority of cases prefer restitution. It seems pretty clear that the oath that the plaintiff took to fix the amount fairly left the matter pretty much to his own conscience,[3] and the texts of the Digest show that the amount operated as a penalty.[4]

Here, then, was an indirect compulsion to secure specific relief, a compulsion not without parallelism to contempt

[1] *Inst.*, IV, 6, 31. "There are some actions again which we call arbitrary because their issue depends on an *arbitrium* or order of the judge. Here unless on such order the defendant satisfies the plaintiff's claim by restoring or producing the property, or by performing his obligation, or in a noxal action by surrendering the guilty slave, he ought to be condemned. . . ."

[2] Fisher, Admiralty and Equity in Pennsylvania, in *Select Essays in Anglo-American Legal History*, II, 810, at 819.

[3] *Digest*, XII, 3, 11. "The false swearing of one who swears to a claim under compulsion of law is a thing as to which inquiry is not lightly allowed."

[4] *Digest*, XII, 3, 1. "When anything has been made the subject of a lawsuit we do not suppose its value to be the greater because by means of the oath to the claim the order made upon the defendant may come to be for a larger amount, owing to his contumacy in not handing over the property; as the thing does not through this order become of greater value, but rather through the defendant's contumacy it is valued above its real worth."

proceedings. But a still more coercive influence than the *arbitratus de restituendo* thus enforced in securing specific reparation was the praetorian power of denominating certain actions as *actiones famosae*, and inflicting the heavy penalty of infamy on one condemned in such actions. This was a most powerful engine for enforcing specific reparation. The results of being declared infamous were the loss of the three important rights of voting, of holding office, and of appealing to the praetor for actions in the courts.[1]

But these *actiones famosae* were always given as *actiones arbitrariae*; so if the defendant chose to make the specific reparation allowed him in the alternative he escaped the very serious consequences of the condemnation. The praetor gave these *actiones famosae* in cases involving fiduciary relations or transactions of good faith, such as partnership, guardianship, mandate (agency), and gratuitous deposit, and in cases of fraud and willful wrong.[2]

But even these two devices of alternative actions and imposition of infamia were not ample enough to satisfy the need of a direct and adequate remedy in all cases where pecuniary compensation was unsatisfactory. The penalty of infamia was so drastic as to be very reluctantly and sparingly used by the praetor,[3] and was obviously often inappropriate to the magnitude of the original breach of duty on the part of the defendant. Moreover the *actio arbitraria* was clumsy and roundabout as well as ineffective where the defendant submitted to pay the sworn value rather than surrender the property of which he had wrongful possession.

One cannot help seeing here also a parallel to our Anglo-American equity's indirect methods of imprisonment for contempt or sequestration proceedings to enforce obedience — drastic and ill-adapted to the varying circumstances under which they must be invoked. No court proceeds

[1] *Digest*, III, 2, 1. [2] *Ibid.* [3] *Ibid.*, IV, 3, 1, § 4.

to these remedies except most reluctantly. Even Lord Eldon, so Sir Edward Sugden told the House of Commons in introducing the " Contempts " Bill, " never committed an individual for contempt without the most anxious consideration, and the most earnest desire to avoid that painful extremity." [1]

Hitherto, then, the development of the law had been, just as in English law, devoted to widening the scope of the remedy afforded for the wrong done; but the very institution of the *actio arbitraria* with its provision of specific reparation as an alternative relief to pecuniary compensation served only to emphasize the inadequacy of the means in the hands of the judex for enforcing the remedies he prescribed. The legal relief was being halted because of the defective legal machinery at the disposal of the court. If the defendant was able and willing to pay the price, he could buy through payment of the *condemnatio* the power to frustrate the plaintiff's right to specific relief.

This was true even in the case of the directer praetorian remedies of the restitutory interdicts and the *restitutio in integrum*. In form the restitutory interdict commanded the restitution of property to one wrongfully deprived of it; but this in the classical period of the Roman law amounted merely to a statement of the principle on which the case calling for the interdict should be decided. The praetor's order was really only preliminary to the appointment of a judex who decided under the ordinary formulary procedure whether there was in fact a situation which should be disposed of along the lines laid down in the interdict. It differs from the ordinary procedure before the judex only in requiring a decision based on an administrative rule laid down by the praetor rather than on a rule of law.[2] The judex was

[1] 32 Hansard 370–371.

[2] Cf. Sohm, *Institutes of Roman Law* (Ledlie's trans., 3d ed.) § 56.

empowered here as elsewhere merely to condemn the defendant to a money compensation for his wrong, or to give him the option of making specific restitution by inserting the *clausula arbitraria* in the *condemnatio*. As Mr. Buckland says:[1]

> Nothing is more remarkable than the contrast between the strenuous language of the interdict and the comparatively feeble way in which it was enforced.

The same thing was true in the other praetorian remedy of *restitutio in integrum*. By the exercise of his magisterial power the praetor could put an applicant back in the legal position he occupied prior to the execution of a transaction or the happening of an event entailing legal consequences. Thus, if one had been led to part with property by fraud or duress the praetor's *decretum* of *restitutio* entitled the applicant, not to the property directly, but to bring an action in which the formula to the judex will direct him to proceed on the theory that the transaction complained of had not occurred.[2] Here again the defendant, even under the *clausula arbitraria* had the alternative of paying a money valuation.

The explanation of the feebleness of the enforcing element in the Roman legal system must be sought in the history of its development. In primitive days the sanction of the law was but weak compared with the sanction of religion and *boni mores* as enforced by the clan or guild. Hence originated the wider scope allowed to self-help in archaic law. The successful suitor did not get his judgment executed by the officer of the court or state, but the court gave him permission to execute it himself, or, by requiring a deposit from both parties prior to a trial of their case, secured its execution by the losing party on pain of forfeiture of his deposit.

[1] Buckland, *Equity in Roman Law*, 28.

[2] Roby, *Roman Private Law*, II, 226–227; cf. Buckland, *Equity in Roman Law*, 36–37.

Traces of the relative weakness of the enforcing machinery of the law survive in all the earliest legal actions. The *legis actio per manus injectionem* was in origin merely a judicially sanctioned seizure by a creditor of the person of his debtor in the presence of the magistrate. The seizure was for the purpose of making the debtor a prisoner until he had satisfied the creditor's claim. The regular instance of such claim is the judgment debt which the debtor has been condemned to pay by the judicium of a judex, but there were other debts the payment of which was similarly enforced.[1] The *legis actio per pignoris capionem* had a similar origin. *Pignoris capio*, the seizure of security, was allowed to a person who had certain kinds of claims against another. He might seek to secure satisfaction of these claims by himself seizing and holding the property of his obligee until the claim was paid. The object of the distraint was not to satisfy the claim out of the property seized, but to put pressure on the person obliged in order to compel his payment. In both these actions the need felt in early days by the law as an agency of the administration of justice for eking out the newly developed power of the state by private strength is patent. Even in the *legis actio sacramento* the law does not rely on its unaided power to insure the performance of its judgment. The action got its name from its characteristic element, the wager made by each party as to the justice of his claim. It was ingeniously adapted to secure the execution of the law's decision by an appeal to the sportsmanship of the litigants, but this was supplemented by a requirement that sureties should be given for the due performance of the *judicium*.[2] By the time of Gaius the mode of enforcing the judgment of the Roman judex was by a seizure and sale of the whole estate of the debtor who did not satisfy its terms,

[1] See Roby, *Roman Private Law*, II, 426–431.

[2] *Ibid.*, II, 340–344.

but a natural execution by direct action of public officers was not yet developed.

An explanation of this tardy evolution may be found in the division of the Roman legal machinery of the formulary period between the magistrate, the praetor, on the one hand, and the judex, a mere private citizen, on the other. The judex, who heard and tried the case and rendered the decision in accordance with the terms of his appointment by the praetor, had himself no magisterial power. Like the common law judge, he could not compel obedience from the litigants. He merely ascertained the right between the parties, and the execution of his judgment was not a matter for him.[1] On the other hand, the praetor in the ordinary course of the administration of justice merely issued the formula to be tried by the judex — in other words he framed the issue between the parties after hearing their statements; and after sending them to a judex for the subsequent proceedings he had nothing more to do with them. The praetor's magisterial power of direct coercion was therefore not available to the judex as a private citizen.[2] Refusal to restore specific property under the arbitrium was disobedience only to the judex, and his only method of enforcement was the imposition of the money penalty of the *condemnatio*, to be followed either by *manus injectio* upon the judgment debtor or, under the formulary period, in addition an execution on his entire property.[3] Thus even in the classical period of Roman law it was possible in every case to buy the privilege of doing an injustice to the plaintiff, to expropriate him of his property at the price of a money payment. Even the *clausula arbitraria* provided only a very indirect exception and one that merely made the expropriation relatively expensive.

[1] Roby, II, 423.

[2] Sohm, *Institutes of Roman Law* (Ledlie's trans.) 227–228; and cf. 243.

[3] Girard, *Manuel de droit Romain*, 637.

Naboth's vineyard was ultimately always at the mercy of a wealthy Ahab.

Moreover, in the great class of cases where a contract required an act other than restitution — for example, a contract to build or perform services, and similar contracts — the *actio arbitraria* was apparently not applicable. Only in exceptional and more or less conjectural cases was any relief possible where money damages were an entirely inapplicable remedy, for example where a woman had put herself *in manu fiduciae causa* and the person with whom she had made coemption refused to re-emancipate her.[1]

These difficulties arising from the narrowness of the judicial remedy, and ultimately from the fact that proceedings before the judex throughout the formulary period were not enforceable by direct exercise of the magisterial power, disappeared when the procedure *extra ordinem* displaced the *ordo judiciorum privatorum*, with its two stages: *in jure* before the magistrate to get a judex and a direction to him as to the issues, and *in judicio* before the judex to obtain trial and judgment. This change began to take place early in the empire, at first in the cases of *fidei commissa* and then gradually, as the superior convenience of the directer action came to be recognized, more and more widely throughout the whole field of the administration of law.[2]

In the procedure *extra ordinem* the entire trial of a case took place before the magistrate himself. His powers were not derived from nor limited to the terms of the formula, and hence he could impose other than a pecuniary *condemnatio*. He could fit the remedy to the situation calling for it.[3] With

[1] See Buckland, 42–45 for this and other examples.

[2] Muirhead, *History of Roman Law* (2d ed.) 344–345.

[3] *Inst.*, IV, 6, 32. "It is the judge's duty in delivering judgment to make his award as definite as is possible, whether it relate to the payment of money or the delivery of property, and this even when the plaintiff's claim is altogether unliquidated."

the rise of the extraordinary procedure began the granting of specific relief in any action where such relief was possible. Moreover, the magistrate, unlike the judex, could enforce his judgment, and when the judgment had prescribed the delivery or restitution of property he authorized his officers to secure this delivery or restitution, by force if necessary. They might themselves seize and deliver the property or otherwise carry the magistrate's decision into effect.[1]

Here at last a remedy appropriate to the right infringed has been developed. The order of the court is suited to the case presented and is effectively enforced in specie; and this enforcement is direct and not dependent upon the court's ability successfully to coerce the defendant to perform.

Another magisterial remedy characteristic of the procedure *extra ordinem* was *missio in possessionem*. Where the property of one owner was threatened with future damage, e. g., from ruined buildings or possible landslip from a neighboring tract, for which the owner of the latter would be liable under the *jus civile*, the praetor gave to the threatened neighbor the right to demand from the other security against future damage (*cautio de damno infecto*). This demand gave the owner of the dangerous property notice to repair or otherwise obviate the possibility of harm. Or he could give the security asked. But if he did neither the praetor would give *missio in possessionem* to the threatened proprietor, a remedy which entitled him to go on the land and take proper measures, supervised by the praetorian officers, for his own protection.

The superiority of the remedy by way of specific relief and its enforcement by natural execution may have become ap-

[1] *Digest*, VI, 1, 68. "When a man is ordered to hand over property and refuses to obey the judge, alleging that he is unable to hand it over, then if he has got it in his hands, possession is on motion transferred from him to the other party by armed force. . . ."

parent only gradually,[1] but the variety of remedies at the disposal of the courts of the later Empire is in remarkable contrast with the almost single recourse of the formulary period. Specific relief did not displace relief by way of damages, but it became the normal remedy, and resort to substitutionary remedies was had only where specific redress was impossible or under the facts of a particular case inequitable.[2]

The modern Roman law, as exemplified in the countries of Continental Europe and Spanish America, preserves the advantage of this variety of means of enforcing obligations. Indeed so usual is natural execution in these countries, so thoroughly normal does it seem to them that specific reparation should be the rule in granting legal remedy and compensation by way of pecuniary damages the exception where specific reparation is impossible in the nature of things or for some special reason inexpedient — e. g. because of difficulties of administering the remedy, — that their codes treat natural execution with a brevity which has been somewhat misleading to students of the common law.[3] Thus for example the French Code provides:

1142. Every undertaking to do or not to do something resolves itself into a right to damages and interest.

But, as Blackwood Wright, the learned translator of the code, points out,

This is only strictly true when the undertaking can only be performed personally by the party guilty of the breach of contract.[4]

This is shown by the sections immediately following:

1143. Nevertheless, there is a right to demand that that which has been done in violation of the contract may be destroyed, and the

[1] Cf. Buckland, *Equity in Roman Law*, 45–46, and Girard, *Manuel de droit Romain*, 1070. Cuq, *Institutions juridiques des Romains*, II, 880, 883–886.

[2] Cf. Girard, 1070–1071.

[3] Cf. Fry, *Specific Performance*, 3, 4.

[4] Blackwood Wright, *French Civil Code*, Annotated, 205–206, note K.

person damaged may obtain the permission of the court to have it destroyed at the other party's expense without prejudice to any action he may have for damages and interest.

1144. The person to whom an obligation is due may also obtain the authority of the court to carry out the undertaking at the cost of the person who gave the contract.

The rule, *Nemo praecise cogi potest ad factum*, which is sometimes thought to prevent any specific enforcement in France, means simply that no one is forced directly to do an act which cannot be done without his personal participation; e. g., a sculptor will not be forced specifically to perform his contract to make a portrait bust. But if the act can as well be performed by the court or its officers — e. g., transfer of title, destruction of buildings condemned to be destroyed — the court will do it without his consent and at his cost.[1]

The German provision both for specific relief and for natural execution is characteristically full and careful. In the Civil Code it is provided:

Sec. 249. A person who is bound to make compensation shall bring about the condition which would have existed if the circumstances making him liable to compensate had not occurred. If compensation is required to be made for injury to a person or damage to a thing the creditor may demand instead of restitution in kind the sum of money necessary to effect such restitution.

The relative positions of specific and substitutionary relief in civil law are emphasized in sections 251 and 253.

251. In so far as restitution in kind is impossible or is insufficient to compensate the creditor, the person liable shall compensate him in money. The person liable may compensate the creditor in money if restitution in kind is possible only through disproportionate outlay.

253. For an injury which is not an injury to property compensation in money may be demanded only in the cases specified by law.

[1] See Garsonnet et Cézar-Bru, *Précis de Procédure* (7th ed.) 521–523; Fry, *Specific Performance*, App. B; Amos, Specific Performance in French Law, 17 *Law Quart. Rev.* 372.

For such cases see §§ 847 ff., 1300, 1715, par. 1.[1] In general, then, and subject only to certain defined exceptions, the primary remedial right under German law is a right to specific relief.[2] And the German Code of Civil Procedure (*Zivilprozessordnung*) makes careful provision for natural enforcement of this remedy.[3]

Most of the provisions of the Code of Civil Procedure relative to execution in the cases where the obligation is to deliver a thing or to perform an act or refrain from performing some act — Bk. VIII, Div. 3 — date back in their present formulation to the first enactment of the Code of Civil Procedure for the German Empire in 1877. They have thus been subjected to an extended test in practice.

Art. 883 reminds one forcibly of Ulpian's statement (cited p. 48, n. 1) from the Digest.

When the debtor[4] is bound to the delivery of a movable or of a quantity of definite movables these will be taken from him by the sheriff (*Gerichtsvollzieher*) and delivered to the creditor. If the thing cannot be found, the debtor is bound at the wish of the creditor to take an oath thus: that he does not have the thing and does not know where it is. The court can direct that the foregoing form of oath be modified according to the circumstances of the case.

884. When the debtor is bound to the delivery of a definite quantity of fungible things or commercial paper, the rule of the foregoing Art. 883, part 1, is applied.

885. If the debtor is bound to deliver, yield up, or vacate (*herauszugeben, zu überlassen, oder zu raümen*) an immovable or a ship (*einbewohntes Schiff*) the sheriff will put the debtor out of possession and put the creditor in. . . .

887. If the debtor does not fulfill an obligation to an act which can be done by a third person, the creditor may obtain from the court of first instance on application authorization to have the act done at

[1] *German Civil Code* (Wang's trans.).

[2] Cf. Schuster, *Principles of German Civil Law*, 184–185.

[3] *Zivilprozessordnung*, §§ 883–890.

[4] " Debtor " and " creditor " are used throughout these sections in the meaning given them in the civil law of the party obliged and the party entitled.

the expense of the debtor. The creditor can apply at the same time to have the debtor decreed to advance the costs to which the doing of the act will give rise, without prejudice to the right to demand an additional advance if the performance occasions a greater expense.

The foregoing provisions do not apply to an execution which has for its object the delivery or giving of a thing.

888. If the performance cannot be made by a third person, and depends exclusively on the will of the debtor, upon the application of the creditor the court of first instance having charge of the litigation shall decree that the debtor be constrained to the performance of the act by pecuniary penalties not exceeding 1500 marks, or by imprisonment.[1] (Certain exceptions provided.)

In this provision the complete difference of the point of view of the civil law from that of the common law is illustrated. Coercive process by fine and imprisonment is applied only where the direct result cannot be achieved without the personal coöperation of the defendant. If performance by a third person can be substituted, or, as the next section to be quoted provides, a judgment of the court may be treated as equivalent in legal effect to performance, these means will be adopted; and so the recalcitrancy of the defendant or the court's inability for any reason to control him will not stand in the way of its doing justice to the plaintiff. The provision in § 894 is of special interest from the viewpoint of this paper.

894. When the debtor is held to make a declaration of will, that declaration will be considered as made as soon as the decree has become final.

Thus if the decree of a court is that the defendant is to declare his consent as to the registration of a piece of land in the land register, the method of transferring title to land in Germany,[2] or to declare his consent that a given sum

[1] Cf. French Civil Law and Decisions cited by Amos in 17 *Law Quart. Rev.*, 377–79.

[2] Neitzel, German Land Law, 21 *Harv. Law Rev.*, 476.

deposited in his favor may be paid over to the plaintiff, in either case by the mere fact that the judgment has become final his consent is considered as given, and without any action on his part the plaintiff may use the judgment to the same effect as if the defendant had actually made the declaration. In other words, he may become the registered owner of the land decreed to be transferred to him, or entitled to the sum on deposit.[1] The parallel between this provision and our own legislation giving a real effect to the decrees of a court of equity scarcely calls for comment, but the simplicity of the provision with its wide applicability may deserve consideration.

It is perhaps evident from this survey of civil-law legislation that European experience has worked out methods of making specific relief the normal remedy of the legal system; and of securing this relief not by the indirect and often unsatisfactory plan of coercing the defendant personally, but by methods more effective and direct: a decree of the court where giving legal validity to a title is the sole requirement, or performance by officers of the court or by the plaintiff himself or his agents at the expense of the defendant wherever such performance will be equally effective. This European experience affords cogent evidence of the practicability and desirability of American legislation of the sort here advocated, and moreover provides, in its careful and systematic development of the subject, a model for the drafting of the American legislation.

[1] Cf. Neitzel, Specific Performance in German Law, 22 *Harv. Law Rev.* 161.

CHAPTER IV

ARGUMENT FROM PARTICULAR APPLICATIONS — THE NEED OF LEGISLATION AND ITS VALUE

It has been settled law in the United States, since the leading case of Pennoyer *v.* Neff,[1] that where the entire object of an action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, so-called constructive service, or substituted service by publication upon a non-resident, is ineffectual for any purpose. Whether process is served upon the defendant outside the state or sent to him, or notice is published in the state, such methods of service or notice are equally unavailing in proceedings to establish his personal liability. So long as the decree of a court of equity merely establishes a personal duty as owed by the defendant, is, in other words, the outcome of a proceeding *in personam*, and has no real operation, a court of equity cannot assume jurisdiction where the defendant has not been personally served with notice within the jurisdiction of the court. If, on the other hand, a decree will have a real effect, will operate in itself to convey title or form the basis for a conveyance by order of the court, or will otherwise have force independent of the act or will of the defendant, then jurisdiction over the subject-matter in dispute will give the court jurisdiction of the cause; and service by publication or otherwise, if properly made under statutory authority, will enable the court to subject the property or interest in property within the state which is the basis of the suit to the claim of the successful litigant.

[1] (1877) 95 U. S. 714.

So long, then, as a decree operates only *in personam*, relief to the plaintiff may be defeated because the court has not and cannot get jurisdiction of the defendant's person. In the past it was the contumacious defendant who defeated equity's attempt to do justice by his obstinate disobedience to the court's decree. To-day it is more often the absentee defendant who defeats equity by his mere inaccessibility to its process, dependent as that process is for its effectiveness upon the control of his person. The typical case now is a situation where A has contracted to convey to B a tract of land in State X and now refuses to make conveyance. Though B's right to relief is indisputable, though the state has entire control over the title and possession of the property which lies within its limits, the state court cannot grant B relief if A remains outside the state, and this because of the purely procedural difficulty that its historical method of granting relief is only by compelling the defendant personally to make the conveyance.

The serious harm which results from clinging to the historical theory that equity can act only *in personam* and to the procedure which results therefrom is often even more than a delay of justice and an increase of its cost — it not infrequently amounts to a direct denial of justice.

Suppose a citizen of New Hampshire holds a contract by which a citizen of Quebec has agreed to convey to him a tract of New Hampshire land. Suppose further that the New Hampshire man is entitled to demand specific performance of the contract, but the Canadian refuses to perform and does not come into the jurisdiction of the New Hampshire court. In what way can the New Hampshire citizen get the specific performance which is the only adequate fulfillment of his right? He may serve the Canadian with process by publication under the New Hampshire statute, but even so can the New Hampshire court grant him a decree? The decree

would have to be that the citizen of Quebec convey the New Hampshire land to the citizen of New Hampshire. But this is a personal decree and could be rendered only upon personal service. The court of equity could not take jurisdiction of the suit since the defendant could not be properly served, although the property in question lies in New Hampshire.

As the Massachusetts court in the case of Spurr *v.* Scoville [1] said:

> This suit is *in personam* merely, and it is wholly immaterial whether the land which was the subject of the complaint be or be not within the jurisdiction of the court.

This case of Spurr *v.* Scoville presented facts very similar to the one just supposed, except that while the plaintiff and the land in question were in Massachusetts the defendant lived in Connecticut. The court refused to decree specific performance and its suggestions as to possible other remedies open to the plaintiff really illustrate the hardship imposed upon him by the limitation of the equity powers of the court. After pointing out that " the attachment of the defendant's land can avail nothing in this case, although if it were a suit at law the attachment might be followed up by a judgment and execution and the land taken in satisfaction," the court goes on to say that the plaintiff is, however, not without remedy, since he may perhaps get the defendant to come into Massachusetts and then serve him, and also get a writ of *ne exeat* to prevent him from escaping the process of the court upon its decree. Or he can sue at law and get damages for the defendant's breach of contract, which damages he may satisfy out of the land. Or, finally, he may go into Connecticut and sue for specific performance there. As to the unsatisfactory nature of the first two suggestions nothing need be said. But as to the third, not only does it impose a

[1] (1849) 3 Cush. 578.

hardship on the plaintiff even where it is possible, but in the hypothetical case previously discussed it would not be possible. Connecticut might grant the Massachusetts plaintiff specific performance in a suit as to Massachusetts land if she had jurisdiction of the parties. But this is because under the United States Constitution Massachusetts would have to give full faith and credit to the judicial act of a sister state. The Quebec court would have no such guarantee of the effectiveness in New Hampshire of any decree it might make, and hence it probably would not order the defendant to make a conveyance.

So unsatisfactory, indeed, was the state of the law as disclosed by the case of Spurr *v.* Scoville that the legislature of Massachusetts was induced thereby, so Professor Ames tells us,[1] to pass the legislation now embodied in Mass. R. L., ch. 147, § 17.

> If a person who is seised or possessed of real or personal property or of an interest therein upon a trust express or implied, is under the age of 21 years, insane, out of the Commonwealth, or not amenable to the process of any court therein, which has equity powers, and in the opinion of the Supreme Judicial Court, the superior, or the probate court it is fit that a sale should be made thereof in order to carry into effect the objects of the trust, the court may order such sale, conveyance, or transfer to be made, and may appoint a suitable person in the place of such trustee to sell, convey, or transfer the same in such manner as it may require. If a person so seised or possessed of an estate or entitled thereto upon a trust is in the jurisdiction of the court, he or his guardian may be ordered to make such conveyance as the court orders.

Under this statute it was decided in Felch *v.* Hooper[2] that where a non-resident defendant had by a written contract agreed to convey Massachusetts land to a Massachusetts plaintiff, when the plaintiff had paid the consideration and had entered on the land with the defendant's

[1] Ames, *Cases on Trusts*, 249, n. 3.

[2] (1875) 119 Mass. 52.

permission and made improvements thereon, the land was charged with an implied trust in the plaintiff's favor, and that under the statute the court was not powerless to enforce the trust merely because the parties holding the legal title were beyond its reach. The court is careful to rely explicitly on the statute, saying:

> The statute gives the court power to render an effectual decree, and that is enough to sustain the jurisdiction when the parties or the subject-matter are within its jurisdiction.

Further illustration is afforded by the comparatively recent case of Silver Camp Mining Co. *v.* Dickert,[1] a case coming from a state without a statute giving courts of equity power to give a real effect to their decrees. This was an action by a Montana corporation against a citizen of Utah to enforce the specific performance of a contract to convey real estate situated in Montana, and to compel the defendant also to make an assignment of certain dividends. Notice of the suit was given by publication under the Montana code provision, and the defendant appeared specially and challenged the jurisdiction of the court. Judgment was given for the plaintiff and the defendant appealed. The Supreme Court held that an action for specific performance of a contract to convey real estate was one *in personam*; that service by publication would not warrant a judgment *in personam*; and that the Montana code provision for the publication of summons did not abrogate the common-law rule requiring personal service of summons in actions *in personam*. Hence the court reversed the judgment for the plaintiff.

These cases may serve to show how ineffective the remedy of specific performance may be in cases where there is no doubt of the existence of a right entitling the complainant to that remedy, but where the court lacks the power itself to

[1] (1904) 31 Mont. 488.

transfer the title from the person who retains it wrongfully to the one who is equitably entitled to it.

On the other hand, cases showing that a statute giving such power to the courts would be effective in enabling them to do justice in the premises are quite numerous. A recent example comes from Maryland. In Hollander *v.* Central Metal, &c. Co.,[1] a Maryland corporation, having purchased the leasehold estate in a certain lot in the city of Baltimore, as present owner of the reversion in the lot, brought suit against non-resident defendants for the specific performance of a covenant contained in a lease of the lessor, her heirs and assigns, to convey the fee to the lessees, their heirs and assigns. An order of publication was made against the defendants as non-residents and they filed a motion to rescind the order and quash the proceedings on the ground, among others, that the suit, being for the specific performance of a contract, was a suit *in personam*. On this point the court cited the Maryland statute authorizing notice to be given non-residents of suits in chancery respecting the transfer of property lying within the state, and also the statute authorizing the court whenever the execution of a deed of any kind should be decreed to appoint a trustee to execute it. It then continues:

> The prayer of the bill and the covenant here sought to be enforced is for conveyance to the appellee of the lot described in the lease; and while the court could not enforce a decree requiring a non-resident to execute a deed for the property, its decree may be made effective under the provisions of the Code by the appointment of a trustee to convey the title of the appellants, and to that end the proceedings are *in rem* and not *in personam*.

In these days of international as well as interstate business relations, property transactions take place without any regard to state or even national boundaries, and the power

[1] (1908) 109 Md. 131.

of the courts to enforce specific performance of contracts as to property within the territory over which they have jurisdiction should certainly not be subjected to purely geographic limitations for what had better be called mere historical prejudice rather than historical reasons.

Another equitable remedy which needs implementing by the statute advocated is the removal of cloud from titles to property lying within the jurisdiction of the court. In the leading case of Hart *v.* Sansom,[1] a suit had been brought by Sansom and another in the Texas court to quiet their title to a parcel of Texas land by canceling a claim made to the land by Hart, a citizen and resident of Louisiana. Hart was notified by publication under the appropriate provision of the Texas statute, and the trial court gave judgment for Sansom to the effect that the " deeds in the plaintiff's petition mentioned be, and the same hereby are, annulled and canceled and for naught held and the cloud thereby removed." Later Hart brought ejectment in the Circuit Court of the United States for the Northern District of Texas to recover the land. That court admitted the judgment of the state court in evidence, instructed the jury that it had divested Hart of his title, and directed a verdict for Sansom. Hart thereupon sued out a writ of error to the United States Supreme Court, and the Supreme Court held that the decree of the Texas court was *in personam* merely, and so was of no effect against Hart since he had not been personally served. Nor was it effective against the land, since the court had no inherent power by the mere force of its decree to annul a deed or to establish a title.

" Generally, if not universally," said Justice Gray, speaking for the court, " Equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land

[1] (1884) 110 U. S. 151.

lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff. . . . It would doubtless be within the power of the State in which the land lies to provide that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title."

An interesting point in connection with the case is that there was at this time a Texas statute,[1] enacted as early as 1846, which provided that "Where judgment is for the conveyance of real estate or for the delivery of personal property the decree may pass the title to such property without any act to be done on the part of the party for whom the judgment is rendered." But as the Supreme Court expressly admitted that a statute could give real effect to the judgment, it must be intended that the Texas statute did not cover the situation in the principal case; apparently because it in terms applied to decrees for conveyances or delivery, and did not cover decrees for cancellation. This appears from the subsequent case of Arndt *v.* Griggs,[2] in which the Supreme Court was called upon to construe the Nebraska statute [3] giving to judgments or decrees rendered for a conveyance, release, or acquittance in the Nebraska courts the same operation as if such conveyance, release, or acquittance had actually been executed by the party defendant. This case also originated in a suit to quiet title. The suit was

[1] Gen. Laws, § 1338. [2] (1890) 134 U. S. 316. [3] See Appendix.

brought by a citizen of Nebraska in the proper state court to quiet title to certain tracts of Nebraska land against claims made by non-residents upon the land — claims which he asserted were a cloud upon his title. The defendants were notified by publication as authorized by a Nebraska statute, and the state court decreed in favor of the plaintiff. The suit in the Supreme Court was one in ejectment between grantees of the parties to the original suit, and the question presented for decision was whether Nebraska had power to provide by a statute that the title to real estate within its limits should be settled by a suit in which the defendant, being a non-resident, was brought into court by publication only. It was contended against that proposition that a decree rendered on service by publication only was invalid because, the action to quiet title being a suit in equity, and equity acting upon the person, the person was not brought into court by publication. Hart *v.* Sansom was relied on as authority for these propositions.

But Justice Brewer, speaking for the court, said:

> While these propositions are doubtless correct as statements respecting the general rules respecting bills to quiet title and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity by virtue of its general powers and in the absence of a statute might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate.

Justice Brewer then examined this question on principle and authority, and concluded that a state had power by statute to provide for the adjudication of titles to property within its limits, even as against non-residents who are brought into court only by publication. The case of Hart *v.* Sansom was shown to be not inconsistent with this doctrine. That decision was based on the fact that no statute of Texas

providing for quieting title against non-residents had been presented.

Here again it appears that in the absence of statute a court of equity may be unable to remove a cloud on the title to property lying within its jurisdiction, because of its inability to apply its only enforcing process to the person of the defendant, be he incompetent, contumacious, or beyond the jurisdiction of the court. Nor will a statute giving power to notify an absentee defendant by publication be itself sufficient to enable the court to transfer the title to the property.. Such remedies as a court of equity may grant over a *res* within its control this statute may empower it to employ against the absentee. It may sequester the property or even put the complainant in possession, but neither of these measures constitutes an adequate remedy for the cloud, which impairs still the most valuable property interest of marketability. Complete redress requires that the court be able to give a clear and marketable title to the person equitably entitled to the property. On the other hand, Arndt *v.* Griggs is clear authority,[1] and cases in accord are numerous in both federal and state courts, to the effect that a statute properly drawn to confer upon courts of equity the power to give a real effect to their decree for the removal of a cloud on title will enable justice to be done to the complainant — will give him a clear and marketable title, unclouded by the outstanding claim of the defendant, wherever he may be.[2]

The equitable remedy of interpleader presents still another case in which the proposed legislation is desirable. The party seeking interpleader against two or more actual or prospective claimants of the fund or other *res* which he holds needs to be freed from danger of suit not merely within the

[1] See especially in Arndt *v.* Griggs, p. 329 of the decision.

[2] Holland *v.* Challen; (1883) 110 U. S. 15; Dick *v.* Foraker, (1894) 155 U. S. 404; Ormsby *v.* Ottman, (1898) 85 Fed. 492; Knudson *v.* Litchfield, (1893) 87 Ia. 111; Short *v.* Caldwell, (1891) 155 Mass. 57.

jurisdiction where he holds the *res*, but also wherever claimants asserting legal title to the *res* may harass him with suits.

In the case of Gary *v.* Northwestern Masonic Aid Association,[1] the plaintiff, Mrs. J. Gary, a resident of Iowa, was the beneficiary of a policy on the life of her husband. But shortly before the latter's death she had assigned and delivered the policy to one E. H. Gary, a resident of Illinois. Later she repudiated the assignment on the ground that it was obtained by fraud, and notified the insurance company to pay the money to her. E. H. Gary had also had the company notified of his possession of the certificate and of his claim. The insurance company then commenced an action in Illinois in the nature of an interpleader, deposited the full amount due on the policy, and asked that Mrs. Gary and E. H. Gary be required to answer the bill and interplead. Mrs. Gary was personally notified in Iowa, and E. H. Gary served in Illinois. Mrs. Gary made no appearance, and a formal default was filed against her in the Illinois court and a decree entered awarding the deposit to E. H. Gary. Thereupon Mrs. Gary sued the insurance company in Iowa and it set up the proceedings in the Illinois court. On motion of the plaintiff this was stricken from the company's answer on the ground that the decree was void for want of jurisdiction over the plaintiff. It was held on appeal that this ruling of the court was sound. The court held that the bill of interpleader and the decree based thereon did not constitute a proceeding *in rem* but a mere attempt to adjudicate a mere personal right to a money demand.

After an elaborate argument the Supreme Court of Ohio reached the same conclusion in a case quite similar in its facts.[2] The applicant for interpleader was a Pennsylvania

[1] (1891) 50 N. W. 27 (Ia.) not officially reported.

[2] Cross *v.* Armstrong, (1887) 44 Ohio St., 613.

insurance company; the policy was a contract made and to be performed in Pennsylvania; the claimants were both residents of Ohio. The company paid the money into court in Pennsylvania and the claimants were properly notified under the provisions of the Pennsylvania law for serving notice on non-residents. The widow appeared and was awarded the fund. The other claimant, the administrator of the decedent's estate, then sued in Ohio. It was urged on behalf of the company that by the judgment of the Pennsylvania court the matter was *res adjudicata*; that the proceeding had become one *in rem* when the fund owed by the company had been put in possession of the court. But the Ohio court rejected the argument on the ground that the proceeding was one of interpleader and therefore *in personam.*

Since, then, here as elsewhere a statute which authorizes a court of equity to deal with absent defendants is, although a necessary element in the relief, not by itself sufficient, recourse must be had to a statute enabling the court to give a real effect to its decree. Here, again, the interstate character of a great part of our business relations, a matter of which insurance is of course a notable instance, makes legislation to enable the settlement of title, not merely to real property but to funds of money, in a single suit a highly necessary reform. It should be possible for the innocent holder of such a fund to be able to pay it into court, and then by published notice summon all parties interested to participate in an adjudication as to the title to the fund, which should be conclusive upon all claimants wherever they are resident. The same doctrine should be extended, and is in practice extended, to the cases of creditors' suits, in which, under the doctrine of rewarding the diligent creditor, equity treats the assets of the debtor as a fund in court for distribution, and after proper publication to give all who have claims against the fund the opportunity to come in and make their claims, bars for laches those who

fail to come. This is really a proceeding *in rem*.[1] A statute which would settle the vexed question of the jurisdiction of personal liability by giving the court having jurisdiction over the debtor or over the debtor's property authority to deal with claims of creditors against him on the lines suggested by the practice in creditors' suits, is highly desirable.[2]

These illustrations make no pretense of being exhaustive. They might be supplemented by cases showing the inconvenience arising from the limitation on equity powers where the person to be coerced into action by the decree is an infant, a feme covert, or *non compos mentis*. But illustration here seems unnecessary. So generally has the need of granting equity power to deal with titles held by infant, lunatic, or feme covert trustees been acknowledged that probably statutes conferring such power are now universal. They date back to 1708 (Stat. 7 Anne, c. 19) in the case of infants, and 1731 (Stat. 4 Geo. II, c. 10) in the case of trustees *non compos mentis*.[3]

It should be borne in mind that the principle involved in these early statutes is precisely the one under discussion in this essay, and their early date is another indication of the early recognition of the necessity of supplementing a jurisdiction purely *in personam* by one more consonant with the nature of the rights an equity court was securing. Indeed so early was this recognition made in these cases of trustees that some courts in America have regarded the jurisdiction as a part of the ordinary jurisdiction of equity and not as dependent upon a statute.[4]

[1] Kerr *v.* Blodgett, (1871) 48 N. Y. 62, 66–67; Samples *v.* Bank, (1873) 21 Fed. Cases, No. 12278. Cf. discussions of Chancellor Walworth in Hallett *v.* Hallett, (1829) 2 Paige 15 at 22, and Chancellor Bland in Williamson *v.* Wilson, 1 Bland (Md.) (1826), 418 at 440. Cf. Smith *v.* Bank of New England, (1897) 69 N. H. 254, a case of liability of trustees to beneficiaries.

[2] Cf. Dicey, *Conflict of Laws* (2d ed.), 310.

[3] See Ames, *Cases on Trusts*, 217–218, notes. Cf. Mass. Stat. 1783, c. 32, § 4.

[4] Cf. Glen *v.* Williams, (1882) 60 Md. 93, 119–120, and Cal. cases cited, 23 and 24.

This attitude on the part of the courts with respect to equity's powers to act *in rem* even in the absence of statute is, as a matter of fact, rather wide-spread. It furnishes an explanation for the practice of Federal courts to insist on a power to avail themselves of state statutes conferring the power on the state courts. At bottom the attitude of the Federal courts really seems to be that the statutory powers have become absorbed into the main body of equity jurisdiction. This doctrine is frankly avowed by some state courts. Thus in the recent case of Tennant's Heirs *v.* Fretts,[1] the court asserted its power, on general equitable principles and independent of statute, to cancel a cloud on West Virginia land against a claim by a citizen of Pennsylvania who had not appeared and had merely been notified by publication under the West Virginia statute. The modern attitude is coming to be that reflected in the bold language of the Wisconsin court in the case of McMillan *v.* Barber Asphalt Paving Co.:[2]

> In the early stages of equity jurisprudence decrees were enforced only *in personam.* This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the various actions investigated and regulated in equity.

Yet while this is the attitude taken by a growing number of courts, there can be no doubt that the limitation to coercive action on the defendant as a means of securing performance of its decrees has been deeply ingrained in the minds of equity judges. This is clear from their sparing use of any other method of enforcement, even although it does not involve any question of title. A striking example is the remedy by mandatory injunction. Equity courts have, of course, the right to avail themselves of the physical powers

[1] (1910) 67 W. Va. 569.

[2] (1912) 151 Wis. 48.

of the state just as freely as courts of common law. Indeed to-day the court of equity and the court of common law are one court, with one set of executive officers at its command. For example its jurisdiction itself to repair a tort specifically where this is physically possible is entirely clear, and was exercised early in the eighteenth century.[1] Yet for all that courts have ordered defendants to repair the tort themselves, or have otherwise sought the redress to be granted to the plaintiff by the old indirect method of putting pressure on the defendant. Compare, for example, the cases of Vane *v.* Lord Barnard[1] and Lane *v.* Newdigate.[2] In the former, decided by Lord Cowper in 1716, the defendant, who, on the marriage of the plaintiff, his son, had settled Raby Castle on himself for life, and remainder to his son for life, in a fit of anger against his son practically dismantled the castle. The court not only enjoined further committing of waste but also decreed that the castle be repaired and appointed a master to see it done at the expense of the defendant. But in Lane *v.* Newdigate, a case in which the defendant had, in violation of a right of the plaintiff, lowered the banks of a canal and let a stopgate fall into disrepair, both the prayer of the bill and the injunction of the Chancellor were directed to securing action by the defendant. This was a case of specific performance of a contract right, but the principle on which the court of equity gives relief in case of affirmative contract is precisely the same on which equity grants specific reparation of a tort. Where the mandatory injunction to the defendant is equally effective with direct action by the court, of course no objection need be made to it; but the mandatory injunction is sparingly and reluctantly used by the courts, in part at least just because its form suggests the practical difficulty of securing satisfactory performance by an unwilling and coerced defendant. This is really a part of the

[1] Vane *v.* Lord Barnard, (1716) 2 Vern. 738. [2] (1804) 10 Vesey 192.

basis for the objection urged by many courts against the specific enforcement of many affirmative contracts, for example, contracts to build or to repair.[1] The authorities on this topic are in a state of considerable uncertainty, and the conflict is due in large part to the reluctance on the part of the courts to coerce performance by the defendant personally.[2] Of course in any case supervision by the court is a more or less difficult piece of administrative work, for which the machinery of our legal system is not well adapted. Moreover, it may take so much time and occupy so much of the attention of the court or its officers as to lead to delay in the court's other work. But where the remedy of the plaintiff at law is clearly inadequate, and so the court would on principle be willing to grant specific performance if it were not for the practical difficulties in the way of enforcement, a recognition of the principle that specific enforcement may in very many cases be secured independent of the will or action of the defendant would enable the courts to do justice in numerous situations where they now feel constrained to decline to act, and so to leave the plaintiff to the inadequate substitutionary remedy. Where the terms of the contract are definite it is usually sufficient performance for the plaintiff's remedy that he be allowed to have the work performed according to the plans by another contractor. The court could, if necessary,[3] appoint an expert to estimate the reasonable cost and decree that it be either met by the defendant or taken out of his property. If the work is of such magnitude and cost that it would be fairer to the plaintiff to have it paid for on the completion of successive stages, this could be done. Such supervision as is needed for this, also of course

[1] Lucas *v.* Commerford, (1790) 3 Brown 166; Rayner *v.* Stone, (1762) 2 Eden 128 and note; Beck *v.* Allison, (1874) 56 N. Y. 366.

[2] For American cases see Pomeroy, *Equity Jurisprudence*, § 1402; for English cases and good discussion see Fry, *Specific Performance* (5th ed.) §§ 98–109.

[3] Cf. Jones *v.* Parker, (1895) 163 Mass. 564.

at the expense of the defendant, would be less difficult and less time-consuming than the supervision from which the court shrinks. It would go far toward reducing the cases where a court could not secure specific performance to those where the performance is of so individual a character that only the voluntary act of the defendant will render it. Of course here again not only will such legislation as is advocated extend the field in which the specific relief can be granted where the court has jurisdiction of the parties as well as the property, but it is the only way in which such relief can be secured against an absentee defendant, where mandatory injunction and contempt process will be unavailing.

It is a matter for congratulation that the new Equity Rule IX of the United States Supreme Court expressly calls attention to this method of acting through third parties at the cost of the disobedient defendant. Its final sentence runs:

> If a mandatory order, injunction, or decree for the specific performance of any act or contract be not complied with, the court or a judge, beside, or instead of, proceedings against the disobedient party for a contempt or sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge at the cost of the disobedient party, and the act when so done shall have like effect as if done by him.

While no legislation is necessary to enable courts to exercise this power, since it is a power possessed by all courts, still the definite recognition by our highest court of the existence of a power almost fallen into disuse will doubtless have a salutary effect. Indeed it might be that a statutory enactment granting this power in express terms to courts of equitable jurisdiction would serve the same useful purpose even more effectively.

CHAPTER V

SKETCH OF THE DEVELOPMENT OF EQUITABLE PROCEDURE *IN REM*

THE attempt has been made to show that other legal systems have reached the end advocated here for American equity, and that the same feeling of need has induced legislation in most of our jurisdictions. But it may further be established that the whole history of the development of equity procedure from the beginning has tended in this direction. Confined at first to proceeding against the person, equity has increasingly endeavored to attain a more direct enforcement of its decrees, and one less subject to the accident of control over the person of the defendant.

The method of execution which is characteristic of equity — its operation by pressure brought to bear on the person against whom its decree has issued — is, in the words of Professor Langdell, a "historical accident," a result of the division of the administration of justice between two sets of courts, the courts of common law and of chancery. The explanation is twofold. Chancery adopted its coercive process to correct a grave defect in the process of the courts of common law. It was confined to this process by the jealousy of these same courts.

Originally the Chancellor administered the residuary justice resident in the King and not delegated by him to his courts of common law. But before the court of the Chancellor had assumed any definite form or organization the common-law courts had already developed a procedure and a theory of procedure which seriously hampered their power to do full justice in many situations. As has already been

adverted to, the courts of common law were unwilling to compel a defendant to redress directly a wrong he had done to the plaintiff. In archaic law, courts are curiously reluctant to put pressure directly upon a litigant. They confine themselves to the indirect pressure of seizing his property to satisfy their judgments from it. This reluctance to coerce the individual perhaps betrays the lingering fear that such coercion might provoke from the defendant thus goaded to the last extremity a violence which would defeat the primary purpose of the law — the maintenance of the peace.

It is true that specific relief was not unknown to English law even prior to its administration by courts of chancery. Glanvill lays it down as a general principle that:

> It is a consequence which naturally results from acknowledging a fact in the King's court in the presence of the King or his justices, or undertaking to do any particular act, that the party should be compelled to abide by or perform it. The party who has broken the concord shall be amerced to the King, and shall be safely attached until he find good security that he will from henceforth keep the concord by adhering to its terms if possible, or will otherwise make his adversary a reasonable recompense.[1]

Indeed, as Pollock and Maitland point out,[2] the original weapons of the courts were punishment, the imposition of a fixed *bot* where the plaintiff's object was really vengeance, and specific restoration or performance where he has been "deforced of something which he claims."

> "This thing," runs one passage, "may be land or services or an advowson or a chattel or a certain sum of money, but in any case it is a thing unjustly detained from him. Or, maybe he demands that a final concord or a covenant may be observed and performed, or that an account may be rendered, or that a nuisance may be abated, or that (for sometimes our King's court will do curiously modern things) a forester may be appointed to prevent a doweress from committing

[1] Glanvill (Beames' transl.) Book VIII, c. 5, 205.

[2] Pollock & Maitland, *History of English Law*, II, 523, 595

waste. Even the feoffor who fails in his duty of warranting his feoffee's title is not condemned to pay damages in money; he has to give equivalent land. No one of the oldest group of actions is an action for damages." Again: "We must repeat once more that the oldest actions of the common law aim for the more part not at damages but at what we call specific relief. By far the greater number of the judgments that are given in favor of plaintiffs are judgments which award them seisin of land, and these judgments are executed by writs that order the sheriff to deliver seisin. But even when the source of the action is in our eyes a contractual obligation the law tries its best to give specific relief. Thus if a lord is bound to acquit a tenant from a claim for suit of court, the judgment may enjoin him to perform this duty and may bid the sheriff distrain him into performing it from time to time (n. Note Book, pl. 837). In Glanvill's day the defendant in an action on a fine could be compelled to give security that for the future he would observe his pact. (n. Glanvill, viii, 5). The history of Covenant seems to show that the judgment for specific performance (*quod conventio teneatur*) is at least as old as an award of damages for breach of contract. (n. P. & M., II, 216–220). We may find a local court decreeing that a rudder is to be made in accordance with an agreement, (n. The Court Baron, Selden Soc. p. 115) and even that one man is to serve another. (Select Pleas in Manorial Courts, p. 157.)"

But while it is true that the action for purely compensatory damages was only gradually developed, a pecuniary liability imposed by way of penalty was the original weapon of the English, as indeed of every archaic system. The *bot*, or compensation for an injury done, was fixed on another principle than that of compensation — the principle of buying off the vengeance of the injured party or his kinsfolk. But in the English as in other legal systems the idea of compensation developed gradually out of this originally more or less arbitrary tariff of compositions. Compensatory damages commensurate with the injury done came into the common law apparently at first as supplementary to specific relief in the assize of novel disseisin where a disseisee has been deprived not only of his land, to which he can of course be

restored, but also of its perishable fruits, for which it may well be only a substituted pecuniary compensation is possible.[1] Once the device of assessment of damages by the recognitors in the assize was invented, the pecuniary remedy, now compensatory, began to encroach on the field of more specific relief besides holding its own in the delictual field, where the money penalty had prevailed from the first. Then its association with the great and prolific action of trespass as the appropriate relief where one to the plaintiff's damage had broken the King's peace still more widely extended its scope of operation; and as the enforcement of obligations began, with the rise of a commercial and industrial civilization, to take the central place in the law once held by the enforcement of purely real rights the triumph of the substitutional remedy in the courts of common law became practically complete. The law, concerning itself more and more with merchandise bought or sold for money, with things having a definite and calculable exchange value, came to conceive that the money compensation, which was an entirely adequate remedy in the common case, and in many cases the only possible one when once the wrong complained of had been committed, was the only remedy available for their use except in the narrow field of actions for the recovery of property to which the complainant has a legal right of immediate possession, and the prerogative writ of mandamus.

Whatever the reason for the displacement of any general exercise of the remedy of specific relief by the substitutional remedy of pecuniary damages, the change early took place, and with it developed the common-law theory of procedure which led the courts to refuse to exercise any coercive control over the person of the litigants. Even the imprisonment of a party was ordered only by way of satisfaction of a judgment

[1] Pollock & Maitland, *History of English Law*, II, 523 *et seq.*

against him, and not at all to compel his obedience to the decision of the court.

But the defects of the prevailing common-law remedy were not only due to the fact that damages are often wholly conjectural and often entirely unfair regarded as an equivalent where the subject matter in dispute is of a unique character, but also because the machinery of enforcement at the disposal of the court was entirely ineffective wherever the defendant had no property to levy upon, or had successfully concealed it from the sheriff, or where the property was of a sort such as choses in action, which were not amenable to the sheriff's process. A method which would remedy this defect of the common-law power to do justice lay ready to the Chancellor's hand in the procedure of the canon law — a procedure, too, with which the Chancellor, himself in the early history of the office almost invariably a cleric,[1] was quite familiar. The direct pressure and control which the courts of common law would not attempt to exercise was constantly exercised by the Church courts upon a defendant *pro animae salute*. How largely the procedure of the courts of equity was borrowed from the canon law has been shown in some detail by Professor Langdell in his Summary of Equity Pleading.[2] But in no particular case were the courts of equity more indebted than in the procedure by which they were enabled to compel obedience to their decrees by putting pressure directly upon the person of a recalcitrant defendant to do what they had decided he ought to do. From the process of Chancery the means of evasion successfully practiced by defendants against the sheriff afforded no escape. It was useless to conceal property or to convert it into kinds upon which the sheriff could not lay hands.

[1] Cf. Kerly, *Historical Sketch of the Equitable Jurisdiction*, ch. vi, 94–95; Spence, I, 340.

[2] Cf. Kerly, *Historical Sketch of the Equitable Jurisdiction*, 37–38.

Moreover, compulsory process against the defendant enabled a court of chancery to protect the plaintiff's right by requiring a specific performance from the defendant of his correlative duty.

This power of enforcement through direct coercion was not, as has been said, unknown to English law, but it was without doubt introduced into the procedure of the Chancellor's court from the courts of the Church, which had maintained in its matured and developed form the remedy which they had in their turn received from the Roman law. These ecclesiastical courts had, of course, prior to the development of the jurisdiction of the Chancellor as an administrator of justice already lost their power as temporal courts;[1] but they still had power to compel specific performance of duties through inflicting the spiritual punishment of excommunication on a contumacious defendant, and if this did not secure obedience they could procure from the King a writ *de excommunicato capiendo* under which the sheriff would arrest and imprison the obdurate offender in the county jail. This process is strikingly similar to that employed by the Chancellor to secure obedience to his decrees.

Punishment for contempt of the King's writ was the original and characteristic feature of the process of the court of Chancery, and indeed it was only against the vehement opposition of the courts of law that any other means of securing the execution of the chancery court's decrees than this imprisonment for contempt was allowed. In the famous case of J. R. *v.* M. P. *et al.*, Prisot, C. J., laid it down roundly

[1] Langdell, *Summary of Equity Pleading*, 35 *et seq.* Cf. also Gilbert, *Forum Romanum*, ch. 2 and 3; Spence, *Equitable Jurisdiction*, I, 344; Burroughs M. R. 1625–1639, *Legal Judicature in Chancery*, 151, citing a MS. note of Sir Julius Caesar endorsed on a decree of 31 H. VIII, "I find by perusal of the Records of the Chancery remaining in the Rolls . . . the Bills were filed and the Decrees written on the backs of the said Bills in Latin and in form as above recited according to the Proceedings in the Civil and Canon Laws with some small difference."

that to execute its decree against a defendant " the chancery can do nothing but order him to prison, there to remain until he will obey, and this is all that court can do." [1]

But the very elaboration of this contempt process to which Chancery was thus confined by the jealousy of the courts of common law,[2] is in itself clear evidence of its inefficiency as a means of securing the performance of the court's decrees or even an appearance to answer its subpoena. In West's Symboleography (1611) we have preserved for us the practice of Chancery in the time of Elizabeth and James I.[3] This discloses the repeated efforts which it might require to compel a defendant to obey the order of the Chancellor. If he failed to obey the decree as communicated to him by service on him of a writ *de Executione judicii*,[4] a writ of attachment first issued against his person commanding the sheriff to bring him before the Chancellor to answer for his contempt.[5] But if the sheriff returned that the defendant was not to be found in his bailiwick Chancery then proceeded to an attachment with proclamation, which differs from the first process in that the sheriff had now to make public proclamation throughout the bailiwick " that the defendant shall appear on pain of his allegiance to answer concerning the contempt."[6] Apparently even this did not always intimidate the defendant, for in default of his appearance on that process a commission of rebellion " issueth to such commissioners as the plaintiff nameth, ordering them to attach the defendant wherever he is found in the kingdom as a rebel and contemner of our law." [7]

[1] Y. B. 37 H. VI, fol. 13, pl. 3 (Ames, *Cases in Equity*, I, 1); cf. Y. B. 27 H. VIII, fol. 15, pl. 6; Equity Cases Abr. 130, pl. 3 and note; Cadell *v.* Smith, (1791) 3 Swanston, 308 and note.

[2] On this point see further Coke, 2 *Inst.* 553, 4 *Inst.* 83; and for examples, Y. B. 2 Rich. III, 9; Brooke, *Abr. Conscience*, 16, 22.

[3] For the practice of a somewhat later period — not much altered — see Powell's *Attourney's Academy* (1647) Decrees, 202–204.

[4] West, Part II, 189. [5] *Ibid.*, Part II, 184, 189. [6] *Ibid.*, 184. [7] *Ibid.*, 185.

At this point West shows the first trace of a process other than one directly against the person of the defendant.

"If," he says, "the party defendant cannot be taken by virtue of the same commission, then if the plaintiff's suit be for title of land the court sometimes grants an injunction to the plaintiff for possession till the defendant hath appeared and answered and satisfied his contempt . . . for the proceeding in this court is by orders, injunctions, and decrees, which if the defendant resist, his punishment for this resistance and for his contempt in not appearing is imprisonment in the Fleet, as is said during the Lord Chancellor or Lord Keeper their pleasure, or until he will obey and perform the order and decree of the same court." [1]

Thus far the process is the same to secure an appearance under the subpoena or a performance of the decree. But in the latter case equity had by this time developed a second method of relief not dependent upon the coercion of the defendant.

"If," West tells us, "the decree be in a suit for land and the defendant abide all the said process of contempt and still detain the possession of the land from the plaintiff contrary to the said decree: then upon a motion thereof made in the court a commission is usually granted to the sheriff and some others near adjoining to the lands in question to put the plaintiff in possession, and to keep him in possession according to the said decree." [2]

Of course the granting of possession, although a remedy, was an incomplete one to the plaintiff, who was still without legal title, but a secondary purpose was also served by this action of the court. It put some additional pressure on the defendant to perform the decree.

So far as appears from West nothing further was left for Chancery to do in the way of effort to catch the defendant; but it appears from other sources that the court had not yet

[1] West, 185*b*, 186. This process was later abolished. Powell, *Attourney's Academy*, 34.

[2] West, 189; cf. Spence, I, 392. Cf. also Earl of Pembroke *v.* Ap Hoell, (1566) Monro, *Acta Cancellariae*, 368.

exhausted its methods of getting hold of the delinquent. The court issued a fourth order, this time to its own serjeant-at-arms — by the Chancellor himself under the Great Seal — commanding him to effect the arrest.[1] If the serjeant was successful[2] the defendant was finally lodged in the Fleet.

This imprisonment for contempt was of differing degrees of strictness. Apparently the practice of different chancellors varied. Under some the confinement was not at all close; for instance a physician was allowed to practice his profession outside the prison, although under the surveillance of a keeper.[3] However, the general opinion seems to have been that greater severity was necessary to make the process effective in securing performance of the Chancellor's decree. Thus Powell, writing in 1647, says:

> Imprisonment for breach of a decree is in the nature of an execution, and therefore the custody ought to be strait and the party not to have any liberty to go abroad but by special license of the Lord Keeper or Lord Chancellor being. But no close imprisonment is to be but by express order for wilful and extraordinary contempt and disobedience.[4]

But instances are not lacking of much severer measures being resorted to in order to coerce obedience from the stubborn seventeenth-century Englishman. Thus in 1598 after one Walter had been already subjected in vain to close imprisonment for some time, the court ordered him to perform within a fortnight "which if he shall not do . . . then his Lordship mindeth without further delay not only to shut the defendant close prisoner but also to lay as many irons on him as he may bear."[5] Again in 1600 one Arundel was ordered

[1] See Adams, *Equity* (1st ed.), 325; cf. Monro, *Acta Cancellariae*, 259.

[2] His commission was often difficult and even dangerous of performance. Cf. Monro, loc. cit., 757, 750, 172, 321.

[3] Spence, I, 389–392.

[4] Powell, *Attourney's Academy*, 202.

[5] Clerk *v.* Walter, Monro 718; and cf. Spence, I, 389–392 and cases cited; also 692.

shut up close prisoner till he should perform the decree, and four months later a further order issued that if he did not perform by the end of the current term he should be fined for persisting in his contempt.[1] And in the same year another defendant was ordered not merely into confinement but to pay at once a fine of £20; then if he should not perform by the end of the term another fine of £20, and if that did not make him perform by the end of the next term a fine of £40, "and so every term after a double fine."[2]

These cases of fines illustrate the tendency of the court to seek a more effective method of compulsion by attacking the defendant's property interests and thus coercing him into obedience.[3] The first step in this direction has already been pointed out,[4] i. e., the writ of assistance devised (or perhaps adapted from the praetorian possessory interdict) in Elizabeth's reign and used in the discretion of the court at first for the purpose of giving interim possession of property in dispute to the plaintiff until the defendant should answer, and later in a suit for the possession of land to put the successful party in possession and maintain him there. The writ of assistance (now superseded in England by the substantially similar writ of possession) is still a useful weapon of American equity.[5] While its primary purpose is an indirect compulsion of the defendant to make him perform the decree, it provides at the same time for a certain measure of specific execution of the decree, independent of the act of the defendant — all the rights and powers of the owner in possession

[1] Arundel *v.* Arundel, Monro 741.

[2] Awbrey *v.* George, Monro 757. Mr. Buckland (*Equity in Roman Law*, 40) compares this with the Roman-Law *actio arbitraria*; cf. p. 41.

[3] Cf. *German Zivilprozessordnung*, § 888, cited ante, p. 52. Amos, Specific Performance in French Law, 17 *Law Quart. Rev.*, 372.

[4] Ante, p. 78. Cf. a later date assigned to this writ (temp. Jac. I) by Lord Hardwicke in Penn *v.* Lord Baltimore, (1750) 1 Ves. Sen. 443, 54.

[5] See *Equity Rules of U. S. Supreme Court*, Rule 9; cf. Root *v.* Woolworth, (1893) 150 U. S. 401, 410.

except the full measure of the power of disposition. Unobtrusively but none the less surely equity here had made a decided advance in its ability to render relief to the plaintiff. It is no longer absolutely dependent on its ability to coerce the defendant.

An even greater advance in the same direction was made in the invention of the writ of sequestration. This was a writ directing commissioners to sequester the personal property of the defendant and the rents and profits of his real property, and keep him from the enjoyment of this property until he cleared his contempt.[1] It was used whether the contempt was in failing to appear and answer the bill or in failing to obey the decree. It could be had both when the defendant could not be found by the serjeant-at-arms and when, having been found, he refused to obey even after being committed to prison for his contempt.[2] At first it seems that the only property subject to sequestration was property involved in the suit, but it came later to be extended to any property of the person in contempt. North, in his life of Lord Keeper Guildford, cites a case in Lord Coventry's time (1625–1640):

" When Sir John Reed lay in the Fleet (with £10,000 in an iron cash chest in his chamber) for disobedience of a decree, and would not submit and pay the duty. This being presented to the Lord Keeper as a great contempt and affront upon the court, he authorized men to go and break up his iron chest and pay the duty and costs and leave the rest to him and discharge his commitment. From thence," says North, " came sequestrations, which now are so established as the run of course after all other process fails and is but in the nature of a grand distress, the best process at a common law after a summons such as a subpoena is. What need," continues he, " all that grievance and delay of the intervening process ? " [3]

[1] Gilbert, *Forum Romanum*, 86.

[2] Perryman *v.* Dinham, (1641) 1 Ch. R. 152.

[3] Cited in Maddock's *Equity Practice* (1st ed.) II, 164.

North seems to be mistaken as to the date of the origin of the writ, which certainly dates back to Lord Bacon's time [1] and apparently much earlier,[2] but the extension of the remedy until it might well be described as a " grand distress " was doubtless as late as Coventry's day.[3] From the first, however, the courts of common law bitterly resented the use of the process as an infringement of their monopoly of proceedings *in rem*.[4] As a matter of fact, the original object of the process was still the coercion of the defendant,[5] but the common lawyers were right in seeing in sequestration a further movement of equity toward a more direct and efficient enforcement of decrees than a proceeding strictly *in personam* could ever secure. In Hide *v.* Pettit,[6] Fountain arguing for a sequestration urged:

> If you should take away sequestration the justice of the court would be elusory; and that after a suitor had been at great charges in obtaining a decree if the defendant would be in prison there would be no remedy for the plaintiff to come by the fruit of his decree; and the remedy by imprisonment would be ineffectual for if he go abroad no escape lies. Upon a judgment in a court-baron a *levari fac'* lies which takes all the profits of the land, and a statute before a mayor takes all. And, therefore, not unreasonable that so great a court as this should have an effectual means of bringing suitors to the fruit of their suit, which without a sequestration cannot be done.

Gradually the scope of the process widened when used to enforce decrees, so that any property of the defendant could be sequestered, and not merely kept from the defendant, but if personal property, sold,[7] or if real estate, its rents and

[1] Cf. *Bacon's Orders* in Powell, 35, 41.

[2] Cf. Earl of Kildare *v.* Eustace, (1686) 1 Vern. 419, 421; Hide *v.* Pettit, (1667) 1 Ch. Cas. 91; Awbrey *v.* George, Monro 758.

[3] Cf. Williams, *Real Property* (21st ed.) 163 n.

[4] Brograve *v.* Watts, (1599) Croke Eliz., 651; Colston *v.* Gardner, (1680) 2 Chancery Cas. 43.

[5] Cf. Bligh *v.* Earl of Darnley, (1731) 2 P. Williams, 619–620; and 2 Daniell, *Chancery Practice* (1st ed.) 690–691.

[6] (1666) 1 Chancery Cases, 91–92.

[7] Wharam *v.* Broughton, (1748) 1 Ves. Sen. 180.

profits used [1] to satisfy the plaintiff's claim. Moreover, out of the sequestrator the court developed the receiver,[2] with all his important administrative functions, still further enlarging thereby the power of the court to give relief to creditors analogous to that given by execution at common law. With the invention and subsequent enlargement of the writs of assistance and sequestration the creation of methods of enforcement came to an end. If sequestration proved ineffective no further process of coercion was available, nor is to-day. But legislation continued the development of a process independent of the will or act of the defendant.

Although not the next in chronological order, the statutes, now universal, permitting decrees for the payment of money to be enforced by ordinary execution as at common law may be cited here,[3] as a still longer step in the direction taken by the writ of sequestration. Here in this class of decrees the court is at last able to enforce its order absolutely independently of the will of the defendant.

Perhaps nowhere does the historical anomaly which still confines a court administering equity to acting *in personam* exhibit itself more clearly as an anachronism than in the situation presented when the court is asked for relief in equity against a judgment. Originally the powers of a court of law to relieve against its own judgment once rendered were very limited, and the method of relief was very cumbrous and difficult of operation. Recourse was naturally had to the powers of the Chancellor to enjoin the person who had obtained a judgment which for any reason ought not to be enforced, from availing himself of it.[4] Out of this clash of

[1] Elvard *v.* Warren, (1681) 2 Ch. R. 192; cf. White *v.* Geraerdt, (1832) 1 Edw. Ch. 336.

[2] Middleton *v.* Lorte, (1617) Monro 245.

[3] *England*: 1 & 2 Vict., c. 110, §§ 18, 19; *United States*: e. g. Cal. C. C. P., § 684; Ill. Hurd's Stats. (1909) c. 22, § 47; United States Equity Rules VIII.

[4] See cases cited in Ames, *Cases in Equity*, I, 5, n. 1.

jurisdictions arose the famous and long-continued controversy which began as early as the reign of Edward IV and culminated in the quarrel between Lord Coke and Lord Ellesmere in the time of James I.[1] The diplomatic adjustment of this controversy was embodied in the doctrine that the court of chancery may restrain a party from executing a judgment which it is inequitable for him to avail himself of; but on the other hand this is not to be regarded as in any wise interfering with the judgment itself.[2] So, as a comparatively recent Wisconsin case rather significantly phrases it:[3]

> The jurisdiction of equity is not exercised to disturb a judgment. That can only be done according to the methods provided by the Code. But it acts directly upon the party who is in a position to, and might, if not restrained of his liberty, enforce a judgment, tying his hand so as to prevent him from doing so; thus leaving the judgment good in form but valueless and harmless in fact.

Out of this historical background, a relic of the days when courts of equity and common law were rivals, with rival judges and bars quarreling for jurisdiction, survives a rule which becomes almost an absurdity when in all but six of our states the court of law and the court of equity are identical in membership. If a judgment has been obtained in a court of law by fraud or deception practiced on the court, means of having that court absolutely vacate and annul the judgment and strike it from the records of the court are now well provided at common law, its powers in this situation having been considerably enlarged in the struggle for jurisdiction with the court of chancery. But if for any valid reason, for example where through mistake the right to move for a new trial has been lost, the relief on the same fraudulently obtained judgment has to be sought in equity, then in the absence of statute all that the equity court can do is to

[1] Spence, I, 674-676.

[2] See Story, *Equity*, II, § 1571.

[3] Balch *v.* Beach, (1903) 119 Wis. 77, 85.

enjoin the person who holds the judgment from ever collecting it.[1] In other words, the same man who as a judge at common law can annul his judgment absolutely cannot acting in equity clear the fraudulently obtained judgment from the record of the court.

But here, as everywhere in the field of equity jurisdiction, the limitation to the court's powers of action for the purpose of coercing the defendant to do equity or to refrain from doing what is inequitable has proved too narrow to survive generally in practice. Here in particular the amalgamation of law and equity under the codes has not merely enlarged the powers of the court to open, amend, and vacate judgments, but where resort must still be had to equity for relief [2] statutes in many states make that relief complete. The equity decree cancels the judgment and wipes it from the record of the court; in a word operates *in rem* and not as formerly merely *in personam*.[3]

These instances of statutory extension of the powers of a court of equity to enable it to give a real effect to its decrees are not exhaustive. The statutes already spoken of in another connection,[4] giving equity power to divest title from incompetent trustees and vest it in new trustees are older than any of these hitherto cited in this chapter and mark even more definitely a break with the doctrine that equity acts only *in personam*.

Of course the very statutes which this essay discusses are themselves the best evidence of the general recognition that

[1] Yancy *v.* Downer, (1824) 5 Litt. (Ky.) 8; Stanton *v.* Embry, (1878) 46 Conn. 65, 74. Note the criticism on this limitation of the court's power in Brooks *v.* Twitchell, (1903) 182 Mass. 443, 447.

[2] Cf. Parsons *v.* Weis, (1904) 144 Cal. 410; Larson *v.* Betenbender, (1896) 100 Ia. 110.

[3] Cf. e. g. Cal. C. C. P., § 738, and Sullivan *v.* Lumsden, (1897) 118 Cal. 664; Jones *v.* Jones, (1908) 140 Cal. 587. Cf. Ky. C. C. Practice, § 552; Ia. Code, § 2877; Colo. R. S., c. 34, § 1408; Whittlesey *v.* Delaney, (1878) 73 N. Y. 571.

[4] See p. 66.

this maxim is an anachronism in our legal system. Out of a past situation in which the administration of justice was divided between rival courts has resulted the anomaly that the court with power to decree the only adequate remedy in many cases of violated rights possesses as its sole means of enforcing that remedy, a process often seriously ill-adapted to its purpose. With the recognition of the unity of our legal system these historical limitations are disappearing, and the reluctance to grant to the courts administering equitable remedies as complete power as is possible in order to make these remedies effective is seen to be little more than prejudice.

CHAPTER VI

THE DEVELOPMENT OF EQUITABLE INTERESTS INTO REAL INTERESTS

§ I. Introductory and Historical

The specific problem under discussion derives both theoretical and practical importance from its relationship to the larger question of the nature of equitable rights. That problem divides the jurists and the courts even to-day; but it is submitted that the trend both of juristic discussion and of the decisions moves toward a recognition that certain equitable rights are genuine rights *in rem*, recognized by a court of equity, although sometimes, owing to the deficiency in its procedure already discussed, inadequately vindicated; and although the court which vindicates them recognizes the large power of a holder of legal title to destroy them by a transfer to a bona fide purchaser.

The essence of rights *in rem* is the generality of the claim they give the owner to affect the actions of others — the extent, in other words, of their incidence.[1] The duties corresponding to these rights are imposed not merely on some single definite person but generally upon all who may deal with the object of these rights, subject only to overriding powers which in some cases may be conferred on some other person for some other purpose. Thus the rights *in rem* of a property owner not to have his property trespassed upon may be subject to the power of eminent domain exercised by the state. In this sense many, though by no means all, so-called equitable rights[2] have now passed beyond the

[1] See Holmes, J., in Tyler *v.* The Judges, (1900) 175 Mass. 71.

[2] For an attempt to enumerate the equitable rights which have become rights *in rem*, see Pomeroy, *Equity Jurisprudence* (3d ed.) I, §§ 146–149 and *ibid.*, II, § 975.

status of rights *in personam* against some particular vendor, trustee, or mortgagee, and have become rights *in rem*, available against all the world, but subject to a power in the holder of the legal title to the property involved to cut off these equitable rights by a transfer to bona fide purchasers for value without notice. Of this more anon.

That there should be a difference of opinion, even so marked a one as exists, on the nature of these equitable rights, is not unnatural when one considers the history of their development. This history is one of progress from contractual to property rights, from rights purely *in personam* to rights not only *in personam* but also *in rem*. Such an evolution is by no means unique; it is indeed the normal and general one not only of similar rights in other legal systems but also of other rights in the Anglo-American legal system. Thus not only did equitable rights develop from rights *in personam* to rights *in rem* in the Roman law,[1] but such common-law rights as the rights of a bailor passed from rights which could be asserted only against the bailee to rights which can be asserted, and asserted in a court of law, against all who may deal with the subject-matter of the bailment.[2]

But this development of certain of the important equitable rights has been taking place at a time recent when compared with the parallel developments above adverted to, and so at a time when juristic conceptions had become stereotyped by being already formulated. In other words, the slow but steady change in the rights of cestui que trust from rights *in personam* against the trustee to rights *in rem* available generally has been lost from view because the nature of the rights had been authoritatively defined while they were still

[1] See Sohm, *Institutes of Roman Law*, (Ledlie's trans., 3d ed.) 310–311, 81–84.

[2] See Ames, *Lectures in Legal History*, 73–76, 181; Holmes, *The Common Law*, 166 *et seq.*

personal. The account of them given by Coke in the end of the sixteenth century is still repeated by the editors of our standard texts in the beginning of the twentieth century as an adequate formulation of the rights by which the law protects the interest of cestui que trust.[1] Our writers are still at least lip-loyal to what was once truth, but is now misleading and even reactionary, not only failing to explain the state of the decisions [2] and the implicit doctrine of the statutory extensions of equity's powers already being made,[3] but also obstructing further progress in the simplification and rationalization of the law.[4]

The history of the development of equitable rights into rights *in rem* can be most clearly and fairly traced in the special case of trusts. A trust is the typical equitable interest for this purpose because of its early development, its intrinsic importance, and the fundamental part the doctrines with respect thereto play in the reasonings of courts of equity.

"Of all the exploits of equity," says Professor Maitland,[5] "the largest and most important is the invention and development of the Trust. It is an 'institute' of great elasticity and generality; as elastic, as general, as contract. This perhaps forms the most distinctive achievement of English lawyers."

"Of all equities," says Mr. T. Cyprian Williams,[6] "an express trust imposed on the owner of land to hold it for the use of another in fee is the most powerful, the most intense, and the most adverse to the owner's legal right." [7]

The history of the development of this important and characteristic Anglo-American institution reveals most clearly a progress from a pure obligation, binding only the

[1] See Lewin, *Law of Trusts* (12th ed., 1911) 11. Cf. Maitland, *Lectures on Equity* (1909) 43.

[2] See *infra* pp. 29–32; 33–36; 55–59.

[3] See *supra* pp. 23–25.

[4] See *infra* pp. 59–65.

[5] *Equity*, 23.

[6] In 51 *Solicitors' Journal*, 155.

[7] See also Pomeroy, *Equity Jurisprudence* (3d ed.) I, §§ 149, 151.

trustee and his cestui, to a property right, enforceable in equity against all the world up to the point where the countervailing right of the bona fide purchaser for value "cuts off the equities" of the beneficial owner of the trust *res*. My thesis briefly is that this attenuation of the trustee's powers and "reifying" of cestui's powers has already reached a stage at which an account of cestui's rights is justified in characterizing them as a complex including not only rights *in personam* against the trustee but also genuine rights *in rem*.[1] The trustee's interest has faded away to a shadow which accompanies the substantial interest of the beneficiary. In the vivid language of Lord Chief Justice Wilmot:[2]

> I take it to be a first and fundamental principle in equity that the trust follows the legal estate wherever it goes, except it comes into the hands of a purchaser for valuable consideration without notice. A court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate; and *the legal estate is nothing but the shadow which always follows the trust res in the eye of a Court of Equity*.

This change in the nature of the trust relationship has been a very gradual one. There was a time in the history of England when the obligation linking the trustee and cestui was not in any sense a legal bond. A use (the direct antetype of the modern trust) depended for its fulfillment upon the faith of the feoffee to uses. He could deny the claim of his feoffor to the profits of the land and appropriate them to himself with no fear of legal interposition, since at law he was the owner of the property entrusted to him. His duty was a purely moral one.[3] As Mr. Ames points

[1] For a concise and accurate statement of the contents of cestui's rights see Professor Pound's review of Willoughby, The Legal Estate, etc., in 26 *Harv. Law. Rev.* 464.

[2] Atty. Gen. *v.* Lady Downing, (1767) Wilm. 1, 22. (Italics supplied by the author.)

[3] Bacon, *Reading upon the Statute of Uses*, 20, 22, 23.

out,[1] although uses are frequently referred to in the books from the latter part of the twelfth century to the beginning of the fifteenth, no intimation exists of any right of the intended beneficiary to proceed in a court of the common law[2] or of Chancery[3] against the feoffee. Moreover, in 1402 the Commons presented a petition in Parliament praying for relief against many feoffees to uses who were alienating the tenements granted, and setting forth that "in such cases there is no remedy unless one be provided by Parliament."[4]

Just when with the growth of Chancery's power to grant relief on a bill in equity Chancery took control of the obligation, is not clear. As Sir Kenelm Digby has said,[5] the materials on which our knowledge of the jurisdiction of the Chancellor is based are very scanty. An application to the Chancellor to protect certain uses of land occurs in Richard II's reign between 1393 and 1399.[6] The first recorded decree in favor of a cestui que use was made in 1446;[7] but Mr. Ames regards it as a reasonable inference from the frequency of bills in chancery during the reign of Henry V (1413–1422) that equity was affording relief to cestuis by this time, and that the purely honorary obligation of the feoffee had become a legally sanctioned one.[8]

At first, however, it was regarded as a pure obligation, and enforceable only by compelling the unconscientious feoffee to make a conveyance of title to cestui or hold it for his

[1] Ames, *Lectures in Legal History*, 236; and cf. Pollock & Maitland, *History of English Law* (2d ed.) II, 228–232.

[2] Cf. Pollock & Maitland, II, 235.

[3] Cf. Bacon, *Reading upon the Statute of Uses*, 20, and Rowe's note, 32.

[4] 3 Rot. Parl. 511, No. 112.

[5] Digby, *History of the Law of Real Property* (5th ed.) 323.

[6] *Select Cases in Chancery*, No. 45.

[7] Myrfyne *v.* Fallan, 2 Cal. Proc. Ch. xxi.

[8] Ames, 237; and see *Select Cases in Chancery*, Cases 117, 118, 122, 135, 138, 147.

benefit.[1] It was this conception of the relationship that Coke's conservatism, his jealousy for the common law, and his corresponding disparagement of the rights enforced in courts of equity jurisdiction, fastened upon our juristic thinking, although even at the time when he wrote, a movement away from the situation he described was already well under way. To Coke, in his often repeated phrase, a use was only " a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cesty que use* shall take the profit, and the *terre-tenant* shall make an estate according to his direction. So as *cesty que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the Common Law, but for breach of trust his remedy was only by subpoena in Chancery." [2]

But even a century before Coke's time this mere right *in personam* against the feoffee who had agreed to hold property to uses had already begun to have added to it by Chancery for the adequate protection of the interests of cestui que trust rights involving duties of others than the feoffee who was under agreement to hold the property in trust for cestui que trust. Although a note of a case in Fitzherbert's *Abridgment*,[3] decided in 1453, runs: " If I enfeoff a man to perform my last will and he enfeoffs another, I cannot have a subpoena against the second because he is a stranger, but

[1] Cf. Y. B. 14 H. VIII (Mich.) fol. 4, pl. 5. See Ames, *Lectures on Legal History*, 238, and cases cited in note 1.

[2] Co. Lit., 272*b*; cf. also 1 Plowd. Com., 352*b*; 1 Co. Rep. 121*b*, 122, 127*a*, 140; 2 Co. Rep. 58*b*, 78; 6 Co. Rep. 64*b*; 7 Co. Rep. 13*b*.

Lord Bacon shrewdly remarks that Coke's reports contain " too much *de proprio*." Bacon's Works (Spedding's ed.) V, 86.

On the influence and character of the Reports see G. P. Macdonnel, Article *Coke, Sir Edward*, in *Dictionary of National Biography* (ed. 1908) IV, 696; and see also Best, C. J., in Garland *v.* Jekyll, (1824) 273, 296.

[3] Title Subpoena, pl. 19.

I shall have a subpoena against my feoffee and recover in damages for the value of the land," even then the comment is appended: " Per Yelverton and Wilby, clerks of the rolls, who said that if my feoffee in confidence enfeoffed another upon confidence of the same land, that I should have a subpoena against the second, but otherwise when he was enfeoffed *bona fide*, for then I am without remedy, and so it was adjudged in the case of the Cardinal Winchester." And by 1465 cestui's interest in the subject-matter of the use was protected by imposing a duty to execute the feoffor's will with regard to this subject upon the general class of purchasers of the property with knowledge of the use.[1] Doubtless the reason for this was that the Chancellors, desirous of lending legal sanction to what was in the thinking of the time according to conscience,[2] enforced against all who with knowledge of the use assumed control of its subject-matter the duty of performing the feoffor's will. But this enforcement constituted none the less a recognition of the real nature of the right which was correlated with this duty imposed upon all of a class of persons who had not bound themselves by a personal obligation to the feoffor or cestui que use.

Just as this enlargement of cestui's right, from a personal one against the feoffee to a general one against purchasers with notice, became fixed only after some hesitation, so also a second extension took place after a similar period of uncertainty. If the use were only a confidence binding on the conscience of the feoffee, then the heir of the feoffee, since his conscience was not bound, would take the legal estate which his ancestor had held to uses, free of these uses. But as early as the reign of Henry VI, petitioners

[1] Y. B. 5 Edw. IV (Mich.) 7; cf. Fitzherbert's *Abr.*, title Subpoena, pl. 14. Cf. also Chudleigh's Case, (1589) 1 Rep. 120*a*, 122*b*; and Mansell *v.* Mansell, (1732) 2 P. W. 678, 681.

[2] Cf. Y. B. 14 H. VIII (Mich.) 4, per Fitzherbert, J. Also Bacon's *Reading*, 20, 29.

sought the aid of Chancery to compel the heirs of feoffees to perform the trusts which had been binding on their ancestors.[1] In Edward IV's reign Choke, J. discussing on a motion the question whether a subpoena would lie against the heir of a feoffee to uses, said he had once sued out such a subpoena, and the matter was long debated. But he said the opinion of the Chancellor and the justices was that it did not lie; so he sued a bill to Parliament. Whereupon Fairfax replied that the matter was a good ground for general discussion by the judges. This was in 1468.[2] Fourteen years later (1482) the Chancellor sought advice on the point with the justices in the Exchequer Chamber. He said that he found records in Chancery of subpoenas as having been granted against the heirs of feoffees. But Hussey, Chief Justice of the King's Bench, said that when he had first come to court thirty years before, it was unanimously agreed by the court that a subpoena would not lie against the heir of the deceased feoffee. To this the Chancellor replied that then it was a big piece of foolishness to enfeoff another of one's land.[3] In 1499 Chief Justice Frowike stated it as law that the heir of the feoffee would not be bound, for the feoffor had not put confidence in the heir, but only in the feoffee.[4] To this, however, the reporter appends a *quaere*. And a quarter of a century later (1522) it had at length become the law that the heir of the feoffee has the same duty as the feoffee himself to carry out the will of the feoffor.[5] But for a long time, even after this, the decisions show the reluctance of the courts to impose a constructive obligation on one who had not agreed personally.[6]

[1] See Goold *v.* Petit, 2 Cal. Proc. Ch. xxxviii; and Saunders *v.* Gaynesford, 2 Cal. Proc. Ch. xxviii, (temp. Henry VI)

[2] Y. B. 8 Edw. IV (Mich.) 6.

[3] Y. B. 22 Edw. IV (Pasch.) 6.

[4] Y. B. 15 H. VII (Mich.) 13.

[5] Y. B. 14 H. VIII (Mich.) 8; cf. also Fitzherbert's *Abridgment*, title Subpoena, pl. 14.

[6] Cf. Weston *v.* Danvers, (1584) Tothill 105.

The extension of the classes bound by the use to include the heir as well as the donee of the feoffee, and his grantee for no value or with notice of the use, marked the extreme limit of the progress in protecting the interest of cestui que use prior to the Statute of Uses. The very case which enumerated these as bound by the use distinguished the widow of the feoffee, who was agreed by the judges to take her dower right to her own use on the ground that she did not take through her husband's act, or claim by him. The same rule governed the case of a lord taking by escheat. He took free of the use. "For," said Broke, J., "in these cases there was no act by the feoffee to deceive or defraud the feoffor, but it was done by order of the law." [1]

It is common learning that the Statute of Uses ultimately failed completely in accomplishing the ostensible aims of its royal proponent,[2] but it is true that the immediate effect of the statute was to check seriously, and for some time apparently almost completely, the enfeoffing of lands to uses,[3] while trusts raised out of chattels or chattel interests in realty, although recognized from the first as clearly outside the statute, were comparatively insignificant.[4] Active trusts casting special duties on the trustee were held soon after the statute to have escaped its provisions, but it was not until nearly a century after the Statute of Uses that the passive trust arose [5] and Chancery resumed the task of developing the rights necessary to the proper protection of the beneficiary, now cestui que trust.

The full significance of this period of slow and obscure growth in the development of the trust doctrine may

[1] Y. B. (1522) 14 H. VIII (Mich.) 4.

[2] See Jenks, *Short History of English Law*, 99.

[3] Kerly, *History of Equity*, 135; and see Buckingham *v.* Drury, (1768) 2 Eden 65.

[4] Buckingham *v.* Drury, *supra*.

[5] See Ames, The Origin of Trusts, IV *Green Bag*, 81, reprinted in *Lectures on Legal History*, 243 *et seq.* Cf. Maitland, *Equity*, 42, and Jenks, *Short History*, 100.

perhaps not be apparent at first blush. The trust, of course, is the successor of the use,[1] and its law in general was modeled by Chancery upon the law of uses. But the classical statement of that law came to be made at a time when the jealousy of the common-law judges of the growing power of Chancery had been exacerbated by the way in which the Court of Chancery was encroaching on the jurisdiction over contracts[2] as well as by the use which the Stuarts were making of the court to further political ends. Moreover, this was a period so definitely dominated by the rigidity of the common-law ideas that, as Maitland says, " change had to be introduced evasively and by means of circumventive fiction. Novel principles could not be admitted until they were disguised in some antique garb."[3] While the Year Book cases could be vouched for the doctrine that a use was only a trust and confidence which the feoffor put in his feoffee, there was an entire absence of definitely accessible authority on the other side. The seeming infrequency with which cases involving the problems of trusts came before Chancery and the absence of published Chancery reports,[4] together with the inexperience of some of the Chancellors and the purely common-law training of others, must have tended to retard the further development of doctrines of the trust. Moreover, these same causes led to the practice of consulting with the common-law judges on cases which did arise. Of course the influence of the latter was always on the side of the traditional view, with its limitation of Chancery's power and its failure to recognize any tendency to extend cestui que use's interest beyond his protection against the disloyal feoffee. Thus in Johnson's case[5] (or as

[1] Lewin, *Trusts* (11th ed.) 6; Kerly, *History of Equity*, 136.

[2] See Ames, Specific Performance of Contracts, I *Green Bag*, 26, reprinted in *Lectures on Legal History*, Lecture XXII, 248, citing numerous illustrations.

[3] Maitland, *Outlines of Legal History*, II Collected Papers, 483.

[4] See Kerly, *History of Equity*, 129 and note.

[5] (1596) Popham, 106.

Coke calls it, Witham's case) the question as to whether the equitable term of a married woman vested in her husband by survivorship or in the wife's administrators was held doubtful in character, so that it was put to the Chief Justices of the law courts, " . . . upon which they and the Chief Baron and all the other Justices . . . were clear in opinion that the said administrators had now as well the interest as the use also of the said term *as well in conscience as in law*, . . . and that the said Witham shall not have it because it is as a thing in action "; or, as Coke reports it,[1] " a thing in privity and in nature of an action, for which no remedy was but by writ of subpoena." And in 1631 a bill in Chancery[2] having been referred to Croke and Jones, JJ., for an opinion, they held that when " a widow is dowable by act or rule in law a Court of Equity shall not bar her to claim her dower; for it is against the rule of law, viz. where no fraud or covin is, a Court of Equity will not relieve."

It was out of this situation that the famous dictum of Coke already cited arose; and this not unprejudiced definition, only partially true when it was formulated, became the classical statement which his great Institutes as well as his Reports — beyond question the most influential doctrinal writings in the history of English law, and for over a century the principal institutes for its understanding — inculcated into generation after generation of the lawyers of both bars.[3] Professor Ames refers to Coke's explanation of the rule prohibiting the assignment of choses in action as an instance of " the power of a great name for the perpetuation of error." It seems not unfair to regard the effect of Coke's arrest of the doctrine of the beneficiary's rights by his formulation of it in terms of an already waning tradition, as a parallel instance of the power of a great name to stereotype a developing doctrine.

[1] 4 *Institutes*, 87.

[2] Nash *v.* Preston, Croke Car. (1631) 190, 191.

[3] See *supra*, p. 92, note 2.

But while the Institutes spoke of the use as a mere confidence in the feoffee the courts of Chancery were none the less steadily developing the trust away from this account of its model. Even Bacon in his famous Reading upon the Statute of Uses, while approving Coke's dictum that a use is neither *jus in re* nor *jus ad rem*, offers as his own definition: "*Usus est dominium fiduciarium*" — use is an ownership in trust, — and adds, "So that *usus et status sive possessio potius differunt secundum rationem fori quam secundum naturam rei*, for that one of them is in a court of law, the other in a court of conscience." [1]

Whether the philosophic Bacon had more than a glimpse of the tendency which had escaped the notice of his erudite but prejudiced contemporary is perhaps doubtful, but the matter is clearer in the actual decisions of Chancery. The very cases which had been decided under the influence of the common-law judges disappeared as authority within their own century. When in Rex *v.* Holland (1647) [2] it was argued that Johnson's (or Witham's) case prevented a husband from taking a trust of his wife's by survivorship, Rolle, J., interposed, saying, "It has since been resolved that the husband should have it in that case." It is significant as showing how far the court had already departed from the strictness of the earlier case, that here the counsel who relied on it said, *arguendo*, "Uses at the common law were things *partly* in action," and that Rolle in his decision said, "A trust is *not* a thing in action but may be an inheritance or a chattel as the thing falls out." [3] A few years later (1678) it was said to be the constant practice of the Chancery court to relieve against the defendant's dower when she was the wife of a trustee, and Nash *v.* Preston was *eo nomine* overruled.[4]

[1] Bacon, *Reading on the Statute of Uses*, 9, (1602). [2] Aleyn 15.
[3] S. C. in Style 20, 21. (Italics supplied by the author.)
[4] Noel *v.* Jevon, (1678) 2 Freem. 43.

These cases show an unmistakable breaking away from the doctrine that the trust relation is a mere obligation. The notion of privity which the judges in the reign of Henry VIII expressly declined to extend to one taking by dower right, now, when stretched to protect cestui against his trustee's widow (who is always treated as a purchaser and not a donee), seems little better than (in Maitland's figure) the antique garb to disguise the novel principle.[1] The progress was doubtless largely unconscious. Equitable principles were still inadequately formulated, and, as Maitland says, "Equity was still living from hand to mouth, finding sufficient for each day the cases in that day's cause list."[2] Moreover, the court still lacked published reports. The phrase in Noel *v.* Jevon[3] — a case in Lord Nottingham's court —: "so it was said is the constant practice of the court now" gets significance in this connection when compared with the quaint chapter heading in Nottingham's own MS. treatise on Equity: "Cap. 7. Equity relieves en plusors cases l'ou les printed livres deny it."[4] Even in the meager notes of Nottingham's decisions — notes themselves not published for some time after his death — we can trace the accelerating breaking-up of the personal-obligation theory. The relief against the widow's claim for dower already referred to was applied to claims of free bench by the widows of copyhold trustees in the case of Bevant *v.* Pope.[5] And in 1673 Nottingham held, in direct opposition to the law laid down in the Year Books as to uses,[6] that the beneficial interest of cestui in the trust property would be

[1] Cf. language of Baron Hale in Pawlett *v.* Atty. General, (1667) Hardres 465, 467–68.

[2] Maitland, *Outlines of Legal History*, II Collected Papers, 490.

[3] *Vide supra*, n. 1.

[4] Quoted in Campbell's *Lives of the Lord Chancellors*, IV, 204.

[5] (1681) Freem. 71.

[6] Cf. Y. B. 14 H. VIII (Mich.) 4, per Broke, J., and Pollard, J.

protected against the claims of the trustee's judgment creditors.[1]

Not only on the side of recognizing the purely representative character of the trustee's interest in the property he held in trust, but also in extending Rolle's doctrine of the substantial nature of cestui's equitable interest,[2] Nottingham helped build up the theory of trusts. He decided that cestui's judgment creditor might prosecute an equitable *fieri facias*,[3] and that a trust of a freehold should be treated as assets in the hands of cestui's heir.[4] This decision was much doubted, and the case presented a question of difficulty which was finally resolved in favor of the soundness of Nottingham's position.[5] It is now well settled that Lord Nottingham was the author of at least the substance of those two sections of the Statute of Frauds (1677) which have been most contributory to the development of the doctrine that cestui's rights are property rather than merely personal rights.[6] Section 9 embodied definitely in law the doctrine which had been making way, especially in the years preceding the passage of the statute, that cestui's interest in the

[1] Morley *v.* Martin, (1673) Rep. t. Finch 63; and cf. also to the same effect Burgh *v.* Francis, (1670) Rep. t. Finch 23, a case of mortgage. And see Finch *v.* Earl of Winchelsea, (1751) 1 P. W. 278, in which Lord Cowper held that where a vendee under an agreement of purchase had paid his money "the articles made for a valuable consideration and the money paid will in equity bind the estate, and prevail against any judgment creditor mesne betwixt the articles and the conveyances." (p. 282.) In the argument, counsel put the matter significantly thus: "If a trustee confessed a judgment or statute, though at law these were liens upon the estate, yet in equity they would not affect it, because the estate in equity would not belong to the trustee but to the cestui que trust." (p. 278.)

[2] Cf. p. 98.

[3] Anon. cited Balch *v.* Wastall, (1718) 1 P. W. 445; and cf. Nottingham's opinion in Pitt *v.* Hunt, (1681) 2 Ch. Ca. 73.

[4] Lord Grey *v.* Colville, (1678) 2 Rep. Ch. 143.

[5] See Lewin, *Trusts* (11th ed.) 1039, 1040.

[6] See Hening, The Original Drafts of the Statute of Frauds and Their Authors, (1913) 61 *U. of Pa. Law Rev.* 283, especially 315; Costigan, The Date and Authorship of the Statute of Frauds, 26 *Harv. Law Rev.* 329.

trust could be assigned or devised by cestui;[1] and section 19 with similar definiteness settled, at least as to simple trusts, the mooted question[2] whether cestui's equitable interests in land were available for the payment of his debts, as well after his death as also in his life time. As Lord Mansfield justly said of Nottingham, "Trusts were not on a true foundation till Lord Nottingham held the great seal";[3] and it is Nottingham's work in the field of trusts especially that has made him known as "the father of Equity."[4]

Progress along both lines — of protecting cestui's interest against others than the trustee and of developing the rules of law governing what Maitland has happily termed the "internal"[5] aspects of cestui's estate — was relatively rapid in the eighteenth century.

"It is the maxim of this court," said Lord Hardwicke, "that trust estates, which are the creatures of equity, shall be governed by the same rules as legal estates, in order to preserve the uniform rule of property; and that the owner of the trust shall have the same power over the trust as he would have if he had the legal estate, for the like interest or extent."[6]

[1] Cf. Warmstrey *v.* Lady Tanfield, (1629) 1 Ch. R. 29; Goring *v.* Bickerstaff, (1622) 1 Ch. Ca. 41, 48; Lord Cornbury *v.* Middleton, (1671) 1 Ch. Ca. 208–211, per Wyld, J.

This was true of cestui's interest in a use even before the statute, 1 R. 3, c. 1. Cf. Duke of Gloucester *v.* Bishop of Ely, (1473) 1 Cal. Proc. Ch. xc; Archbishop of York *v.* Osborn, (1474) *ibid.* xciv; Flykke *v.* Banyard, (1483) *ibid.* cxv; and cf. also Tryppe *v.* Chevyn, (1484) *ibid.* cxvi; Baildon, *Select Cases in Chancery*, Case 127 (undated).

With 1 Rich. III, c. 1 cf. 50 Ed. III, c. 6. As to the meaning of 1 Rich. III, c. 1, see Combe's Case, (1613) 9 Co., 75*a*, 75*b*, and 1 Spence, *Equitable Jurisdiction*, 461.

Coke's theory that cestui's interest was a mere chose in action seems in the case of transfers by cestui actually to have set back the clock for a century.

[2] Cf. p. 100, *supra*.

[3] Burgess *v.* Wheate, (1759) 1 Eden 177, 223.

[4] See Blackstone, *Commentaries*, III, 55, 56; Campbell, *Lives of the Lord Chancellors*, IV, 204.

[5] *Equity*, 117.

[6] Hopkins *v.* Hopkins, (1739) West t. Hardwicke, 606–609; cf. Watts *v.* Ball, (1708) 1 P. W. 108, 109, per Lord Cowper: "Decreed by the Lord Chancellor that

Under the influence of this doctrine of the court, the rights of cestui que trust were treated in equity on the analogy of the common law, just as if they were estates. They could be disposed of by cestui.[1] They were held to descend like legal estates of the same sort.[2] The husband of a feme covert cestui que trust had curtesy,[3] although the husband of cestui que use had been held not entitled to it in Coke's day.[4] The widow of cestui que trust was by an anomaly [5] refused dower in her husband's estate [6] until a modern statute, the Dower Act of 1833,[7] corrected it.

Statutes dating back to Henry VIII's reign had recognized cestui's substantial estate by providing that his estate of inheritance should be forfeited to the crown for treason.[8] By judicial decision an equitable term of years was forfeited by the commission of a felony by cestui que trust.[9] On the other hand, the influence of Coke's doctrine was too strong to permit the logical step of holding that an equitable estate should escheat on the failure of heirs. In the great case of Burgess *v.* Wheate[10] the whole learning of the subject was marshalled by the judges in a decision reached by a divided court, Lord Keeper Henley (afterward Lord Chancellor Northington) and Sir Thomas Clarke, M.R., holding that on

trust estates were to be governed by the same rules and were in the same reason as the legal estate . . . and if there were not the same rules of property in all courts all things would be as it were at sea and under the greatest uncertainty."

[1] Warmstrey *v.* Lady Tanfield, (1629) 1 Ch. R. 29; cf. Lord Cornbury *v.* Middleton, (1671) 1 Ch. Ca. 208, 211, per Wyld, J.: "An interest in a Trust is in equity assignable or devisable." See p. 101, n. 1.

[2] Blackburn *v.* Graves, (1675) 1 Mod. 102.

[3] Sweetapple *v.* Bindon, (1705) 2 Vern. 536.

[4] Chudleigh's Case, (1589) 1 Rep. 122*a*.

[5] See Mansfield in Burgess *v.* Wheate, (1759) 1 Eden 177, 224, and Casbourne *v.* Scarfe, (1737) 1 Atk. 603, per Hardwicke. But cf. D'Arcy *v.* Blake, (1805) 2 Sch. & Lef. 387, 388, per Lord Redesdale.

[6] Colt *v.* Colt, (1664–65) 1 Ch. Rep. 254.

[7] 3 & 4 Wm. IV., c. 105.

[8] 33 H. VIII, c. 20, § 2; 5 & 6 Ed. VI, c. 11, § 9.

[9] Pawlett *v.* Atty. Gen. (1665) Hardres 465, 467.

[10] (1759) 1 Eden 177.

the failure of heirs of the owner of an equitable fee simple who had died intestate, the crown could not bring a subpoena to compel a conveyance from the trustee as the trust was absolutely determined. Lord Mansfield was of opinion that the crown should take by escheat. The opinion of the Master of the Rolls is a very thorough and careful discussion of the authorities. From a study of them he felt that the analogies of the law compelled him to follow the legal rule, which he conceived to be that the law gives escheat only for want of a tenant. Here there was a tenant, the trustee, and equity must follow the law. He declined to give an opinion as to the right of the trustee, saying, however, " If the trustee came into a court of equity I might be of opinion that he had no right." [1] While he recognized also the invidious enrichment which might result from the decision he felt bound by the limitation set to equity by the clear doctrine of the law.[2] Lord Keeper Henley, with equal learning, relied more explicitly on the authority of Coke and his predecessors, who wrote at a time when the right of cestui que use had not yet matured.[3] He said:

> It seems pretty certain that in the consideration of uses with regard to escheat, courts of Equity proceeded on the same principles as the law; and if there was a tenant seised of the land to perform the services, had no regard to the *merum jus* of the tenant.[4]

His fundamental objection to the crown's claim was that the trust was extinguished. But he put his doctrinal position very clearly as follows:

> Where there is a trust, it should be considered in this court as the real estate, between cestui que trust and the trustee and all claiming by or under them; and the trustee should take no beneficial interest that the cestui que trust can enjoy; but for my own part I know no instance where this court ever permitted the creation of a trust to affect the right of a third.[5]

[1] 212. [2] 214. [3] See e.g., 246–248. [4] 244. [5] 251.

In other words, both the Master of the Rolls and the Lord Keeper held to the view that the only property right involved was that of the trustee, hitherto qualified by the obligation which he owed cestui — an obligation which had now disappeared.

On the other hand, Lord Mansfield took with equal definiteness the position that trusts had now advanced beyond this point. He began by promising to contrast uses and trusts, enunciating as his thesis:

> The opposition is not from any material difference in the essence of the things themselves. An use and a trust may essentially be looked upon as two names for the same thing; but the opposition consists in the difference of the practice of the court of Chancery. If uses before the statute of H. VIII were considered as a pernancy of the profits, as a personal confidence, as a *chose in action*, and now trusts are considered as real estates, as the real ownership of the land; so far they may be said to differ from the old uses; though the change may be not so much in the nature of the thing, as in the system of law made use of upon it.
>
> Having defined the terms, I will first shew, negatively, what is not the law and nature of trusts. I apprehend the old law of uses does not conclude trusts now; where the practice is founded on the same reason and grounds, the practice is now followed. Its positive authority does not bind where its reason is defective; more especially that part of the old law of uses which did not allow any relief to be given for or against estates in the *post* does not now bind by its authority in the case of trusts. (pp.217–218).

He then carefully reviewed the progress of the equitable doctrine from the time when a use of land imposed only a moral obligation on the feoffee down to the time of the case at bar, and concluded:

> An use or trust heretofore was (while it was an use) understood to be merely as an agreement, by which the trustee, and all claiming from him in privity, were personally liable to the *cestui que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this

court is the same as the land, and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared, it results by necessary implication; because the trustee is excluded, except where the trust is barred in the case of a purchaser for valuable consideration without notice.

The trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. There is no distinction now between those in the *per* and *post*, except in that case of dower which is founded, not upon reason, but practice (pp. 226–227).

From this reasoning Mansfield arrived at the position that the trust estate escheated, as a legal estate would under similar circumstances, although the lord who comes in by escheat is not in any sense privy to the trust.

It will probably be agreed that Mansfield's view of what would be a following of the legal analogy was a sounder one than Clarke's,[1] and the only question would be whether the analogy could be followed here consistently with the personal theory of trusts. It is sometimes suggested[2] that Lord Mansfield was influenced by his civil-law training, and doubtless this is true.[3] The civil law had gone through the various stages of regarding an equitable claim as only a moral right, then as a pure obligation, and finally as a true right *in rem*. But Mansfield's familiarity with this history served to illuminate rather than befog his survey of the history of the trust in England. Had his view prevailed it seems likely that the occasional injustice which results from the application of the personal theory (e.g., in such a rule as that which in some jurisdictions bars cestui's right when his trustee had been guilty of laches), as well as the uncertainty and conflicting views both in the special law of trusts[4]

[1] Cf. Maitland, *Equity*, 114.

[2] E.g., by Lord Redesdale, in Shannon *v.* Bradstreet, (1803) 1 Sch. and Lef. 52, 66.

[3] Cf. principal case, 218.

[4] Cf. Cave *v.* Cave, (1880) 15 Ch. D. 639, and Sturge *v.* Starr, (1833) 2 M. &

and its collateral applications in other fields [1] would have been obviated. In England the legislature conformed the law on the specific point of escheat of cestui que trust's interest, by statute in 1884,[2] providing that in the event of any person's dying intestate and heirless in respect of any real estate consisting of an equitable interest, whether it is devised by him to trustees or not, the law of escheat is to apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.

While the development of the trust doctrine was thus bringing out the resemblance between equitable estates and legal estates as to the incidents of each, a similar development was extending the protection of the estate of cestui still further against incidents affecting the legal estate of the trustee.

The question whether, when a trustee suffered an escheat, the property held in trust would go to the lord free of the trust, had been discussed as early as 1666 by Lord Bridgeman, who, in a dictum in Geary *v.* Bearcroft,[3] is reported [4] to have said: "A man conveys land in trust and the trustee commits felony, these lands shall be forfeited, though he may have relief in equity." A similar view was expressed by Sir John Trevor in Eales *v.* England.[5] "Here B is but a trus-

K. 195, and other cases cited in Ames, *Cases on Trusts* (2d ed.) 315 (n. 1); cf. also Cave *v.* Mackenzie, (1877) 46 L. J. Rep. Ch. 564, and cases cited in Ames, *Trusts*, 309, n. 2.

[1] See for example the problems in constitutional law, conflict of laws, and real property law raised in the cases of Fall *v.* Eastin, (1905) 75 Nebr. 104; s.c., (1909) 215 U. S. 1; Selover, Bates & Co. *v.* Walsh, (1912) 226 U. S. 112; Bank of Africa, Ltd. *v.* Cohen, (1909) 2 Ch. 129, 143; London, &c., Ry. Co. *v.* Gomm, (1874) 20 Ch. D. 562, 580: — cases cited by Professor Hohfeld, Some Fundamental Legal Conceptions, (1913) 23 *Yale L. J.* 16; and also Gray, *Rule against Perpetuities* (2d ed.) 252, 254; Woodall *v.* Clifton, (1905) 2 Ch. 257, 264, 265; MacKenzie *v.* Childers, (1889) 43 Ch. D. 265, 279.

[2] 47 & 48 Vict., c. 71, § 4.

[3] Carter 67.

[4] But see note by Eden in his report of Burgess *v.* Wheate (1 Eden 177, 230), doubting the accuracy of the report.

[5] (1702) Prec. in Ch. 200, 202.

tee which will not prejudice cestui que trust: if the trustee die without heir the lord by escheat will have the land at law, yet subject to the trust here." Of course the majority of the court in Burgess *v.* Wheate held an opinion contrary to this,[1] and it was left to Parliament to settle the question, which it did in 1834 by recognizing, as in other cases, that the misfortune of the trustee should not affect the rights of cestui que trust.[2]

The question whether cestui que trust should suffer if the trustee forfeited his estate for treason was indirectly decided in Pawlett *v.* Atty. Genl.,[3] a case of a mortgage. The mortgagor's equity of redemption was protected against a forfeiture for treason by the mortgagee. Baron Hale decided in favor of the mortgagor on the ground that "a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise. Because it is an ancient right which the party is entitled to in equity." He expressly distinguished an equity of redemption from a trust on the ground that "they only are bound by a trust who come in in privity of estate. A tenant in dower is bound by it because she is in the *per*, but not a tenant by the curtesy, who is in the *post*." (p. 467.) The distinction was perhaps justified in 1667 on the state of the authorities,[4] but the argument on the merits is the same in both cases.[5] Here again Parliament settled the doubt in favor of protecting cestui que trust.[6] As to the protection of cestui from creditors of the trustee, the doctrine on this point was rounded out by the decision that even the bankruptcy of the trustee did not affect the rights of cestui.[7]

[1] See 201–203. [2] 4 & 5 Wm. IV, c. 23, and cf. 13 & 14 Vict., c. 60, §§ 15 and 19.

[3] Hardres 465. [4] Cf. Mansfield's remarks in Burgess *v.* Wheate, 222.

[5] See Sanders, *Uses*, 253; and cf. Dixon *v.* Savile, (1783) 1 Bro. C. C. 325, more fully reported and discussed 2 Pow. Mort. 693, 1st American ed. (1826) from 6th English ed.

[6] 4 & 5 Wm. IV, c. 23.

[7] Ex parte Chion, (1721) 3 P. W. 186, n.

There remained still a line of authority, on which the conservatives laid much stress, in support of the doctrine that only those claiming in some sort of privity with cestui are bound by the trust — or, to put it in other words, that cestui's rights were personal, given only against the trustee and those claiming under him: "in the *per*," as the judges put it, and not "in the *post*." This doctrine was a foundation stone of Coke's theories, and the case usually vouched for it was Sir Moyle Finch's Case, reported in Coke's Fourth Institute:[1] a case of disseisin, in which the common-law and exchequer judges to whom the case was referred by Queen Elizabeth held that a disseisor of a trustee was not bound by the trust. The authority of the case as a basis for equitable doctrine is, however, weakened by several considerations. In the first place, the decision was by the common-law judges, overruling the Chancellor, who had decreed for the plaintiff. Again, its reasoning is based on a doctrine of the non-assignability of trusts, soon to be obsolete, if it ever was really a Chancery doctrine;[2] and moreover, the decision was in part due to the opinion of the judges that the case, since it involved the determination of a right of inheritance of freehold, was not one for Chancery to deal with in any event. But another ground for the decision was that the disseisor was in the *post* (p. 86). He did not, in other words, claim through the trustee, but by an original though wrongful title of his own, which was adverse to the trustee's and not derivative.[3] This is the doctrine emphasized in Gilbert's great book on Uses and Trusts.[4] " . . . A disseisor comes into the same estate but not by contract or agreement, and

[1] (1600) *Fourth Inst.*, 86.

[2] See p. 101, n. 1; Jenks, *Short History*, 295, 296; Scrutton, *Land in Fetters*, 83–84.

[3] *Cf.* Chudleigh's Case, (1589) 1 Rep. 120*a*, per Popham, 139*b*.

[4] Baron Gilbert's book (1734), it may be remarked, by its uncompromising enunciation of the old doctrine of privity in a work of great learning and authority, did very much to continue the tradition begun by Coke. The influence of the book was enhanced by the learning and ability of its editor, Lord St. Leonards (ed. of

therefore he is in the *post* — i. e., claims not by or from the feoffee " (p. 177). " A disseisor cannot stand seised to a use, there being no privity of estate nor confidence, and so no ground to subpoena him to Chancery, and they cannot there take notice of his title for they are not there to determine the right of inheritance " (p. 201).[1] The case of the disseisor, then, seems to furnish a test case as to whether cestui's estate is one independent of the trustee's or is essentially not an estate at all, but only a right to have the trustee use the latter's estate for the former's benefit.

If the second view is sound, then the statement of Lord St. Leonards in 1811 is still true:

> At this day everyone is bound by a trust who obtains the estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A, who is a trustee for B, and a claim is not made in due time, A will be barred, and his cestui que trust with him, although I had notice of the trust.[2]

But a new development in equity doctrine was undermining this position — the doctrine usually spoken of as the Rule of Tulk *v.* Moxhay.[3] This rule referred to negative covenants imposing an equitable burden upon land. As stated by Lord Cottenham in the principal case, the rule is: " If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."[4]

1811). A typical passage, setting forth, in language quite unqualified by the progress of equitable doctrine since the Statute of Uses, the doctrine that a trust is a mere confidence in the person of the trustee, is found on pp. 177–178.

[1] The authorities cited by Gilbert here, and in other passages on the subject, are Coke's *Reports* and *Institutes*. Cf. also 169, 228, and Sugden's note, 228, in Sugden's ed.

[2] Gilbert *Uses* (Sugden's ed.) 249, editor's n.; and cf. Lewin, *Trusts* (11 ed.) 274–275.

[3] (1848) 2 Ph. 774.

[4] That this is a proper statement of the doctrine of the case is shown by the

For some time the case of Tulk *v.* Moxhay was regarded by a large number of the judges and members of the bar as laying down a rule that a restrictive covenant imposed a burden on the conscience of the assignee. But the theory which seems now to have prevailed is the one first explicitly set forth in Sir George Jessel's well-known decision in London & Southwestern Ry *v.* Gomm,[1] in which he explained the nature of the equitable burden as "either an extension in equity of the doctrine of Spencer's case[2] to another line of cases, or else an extension in equity of the doctrine of negative easements," and added: "The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden, the notice was required merely to avoid the effect of the legal estate, and did not create the right; and if the purchaser took only an equitable estate he took subject to the burden whether he had notice or not." (p. 583.)[3]

The latest chapter in the long story is that which turns upon the case of *In re* Nisbet and Potts' Contract.[4] In 1903 Potts bought land from Nisbet under a special agreement providing that the title to the property should commence with a deed dated in 1890, in which deed it appeared that one of Nisbet's predecessors in title had acquired a title by possession under the Statute of Limitations. Potts agreed to be considered as having full notice and knowledge of this deed, and to be bound thereby. An abstract was delivered

language of Lord Lindley in Hall *v.* Ewin, (1887) 37 Ch. D. 74, 81: "The principle of Tulk *v.* Moxhay imposes a burden on the land."

[1] (1874) 20 Ch. D. 562.

[2] 5 Rep. 16*a*.

[3] For fuller discussion of the general doctrine of Restrictive Covenants than the limits of this essay will permit, see Ashburner, *Principles of Equity*, 507–513; and Jolly, *Restrictive Covenants Affecting Land*, especially Chap. II.

[4] (1905) 1 Ch. 391; (1906) 1 Ch. 386 (C.A.).

which did not show the existence of any covenants restricting the use of the land, but Potts later learned from other sources that in 1872 the man then in possession of the land, against whose heirs the title by possession had been acquired, had entered into covenants restricting building on the land. On this ground Potts claimed the right to rescind the contract. Nisbet contended that he had purchased in 1901 without notice of the restrictions, having then accepted a title commencing in 1878; and having regard to this and to the fact that his own and his vendor's title was founded on adverse possession, the restrictive covenants no longer bound the land. Had Nisbet insisted on and obtained a forty-year title, he would have had notice of these covenants.

Two distinct questions were raised by these facts: had the vendor, Nisbet, constructive notice of the covenants; and if so was he bound by them ? As to the former it was held that he had such notice. He had contented himself with limiting his inquiries to the situation subsequent to 1878. But, as the court pointed out, if he chose to take less than a forty-year title " he cannot by so restricting his investigation and by not inquiring into the title for the full period of forty years say that he is not affected with notice of such equities affecting the land as he would have ascertained by reasonable inquiries into the title for the earlier part of the forty years." [1] But the other question still remained. Even if the vendor had notice of the restrictive convenant, was he bound by it ? He was a purchaser from a disseisor, who was not only not in privity with his disseisee but adverse to him. His title was entirely independent of relation with that of the disseisee, who had entered into the covenant. But the opinion not only of Farwell, J., in the court of first instance, but also of Collins, M.R., Romer, L. J., and Cozens-

[1] Per Romer, L. J., in Ct. of App. (1906) 1 Ch. 386, 408, and cf. Cox and Neve's Contract, (1891) 2 Ch. 109.

Hardy, L. J. — the unanimous court of appeal — was that the disseisor and Nisbet, the purchaser from him, were alike bound by it; and this on the ground that the equitable rights of the persons entitled to the restrictive covenants were not extinguished by the Statute of Limitations, since they were rights *in rem*, good against all but bona fide holders of legal title for value — which of course the original disseisor and Nisbet were not.[1]

The language of Farwell, J., is very pointed:

> It is clear, therefore, that the person entitled to the benefit of the restrictive negative covenant over Blackacre has an equitable interest in Blackacre, and that such interest has the same nature and qualities as any other interest in land in respect of priority, notice, and the like, but that notice forms no part of the cause of action in respect of such equitable interest. The plaintiff's claim depends on the validity and priority of his own charge, not on any notice unless and until the owner of the land sets up as a defence the plea of purchase for value without notice and with the legal estate.

Farwell, J., definitely repudiates the idea that the person to be bound by the covenant must derive title from the covenantor,[2] and after pointing out that the disseisor here was not a purchaser for value, continues:

> He could not therefore have set up any want of notice as an effectual defence to an action to enforce the restrictive convenants against him, and I am of opinion, therefore, that the land in his hands was bound by these covenants.

Again Farwell, J., held that the burden of the covenants was paramount to the estate of the dispossessed owner, and that the case was really analogous to that which would arise where a disseisor enters on land subject to a legal easement. There of course the disseisor takes the land subject to the easement.

[1] Cf. Farwell, J., at 399, (1905) 1 Ch. 391.

[2] Cf. 398.

This opinion after very careful consideration, since the Judges recognized avowedly the importance of the decision,[1] was unanimously affirmed in the Court of Appeal. Collins, M. R., discussed the argument of the appellant's counsel that the disseisor came in by paramount right and so should not be held bound by obligations binding on the disseisee, and, relying on Sir George Jessel's reasoning in London & South-western Ry. *v.* Gomm,[2] held that the restrictive covenant created a paramount right in the nature of a negative easement in the person entitled to it over the land to which it related — a genuine right *in rem* with a correlative duty, which, as he said, would pass to all persons who subsequently became assignees of the land. Romer, L. J., emphasized more than once in his opinion the doctrine that the covenant bound the land in equity, and could " be enforced as against subsequent owners of the land, subject only to the limitation that, being equitable, it cannot be enforced as against a bona fide purchaser of the land — that is to say of the legal estate — without notice " (p. 405).

It may be urged that this is not a holding as to trusts, but only as to restrictive covenants; but despite a possible suggestion by Romer, L. J., that there is a distinction, (see p. 407) there seems no valid ground for any position other than that any argument that a restrictive covenant confers an equitable right *in rem* will *a fortiori* be true of a trust; and indeed this is now admitted by everyone,[3] including even the most vigorous opponents of the decision.[4]

In the definiteness with which it repudiates the idea that equitable rights are merely rights *in personam* against an

[1] Cf. 409, per Cozens-Hardy, L. J.

[2] 20 Ch. D. 562.

[3] Lightwood in 13 *Laws of England*, Art. Equity, 89, n. 5: " The principle applies equally to a trust."

[4] See the matter discussed at length by Mr. T. Cyprian Williams in 51 *Sol. J.* 155 (1906).

obligor and those in privity with him, this case may fairly be said to mark the complete abandonment in the English courts of the theory to which Coke had lent the weight of his learning and his name.

§ 2. The Doctrine of the Bona Fide Purchaser

Thus gradually, by slowly widening circumvallations, protection has been thrown around the interest of cestui in the trust estate of which he is the beneficiary. Equity gives him rights not only against the trustee who is bound to him by the trust obligation, but also against those classes of persons who may be said in some large use of the word to be in privity with the trustee: — the trustee's heir, his donees, purchasers of the legal estate from him for value but with notice of the trust, his creditors, his assignee in bankruptcy; even against his widow in her claim of dower. Going still further, equity protects cestui's interest against the lord of the trustee, who may not take by escheat or by forfeiture the land to which the trustee holds the legal title; and now against a disseisor, whose title is not in any sense, however remote, derivative from the trustee's. But a crucial matter still remains. It is still contended that the rights of cestui, in spite of the generality of their incidence, are not rights *in rem*; for cestui's claim to the property is not protected against a bona fide purchaser of the legal title for value without notice. After all, it is urged, the right is only a right *in personam* against the trustee; for if the trustee sell to a bona fide purchaser for value and convey to him the legal title, cestui has no longer any claim to the trust property as against this purchaser, but is remitted to his remedies against the disloyal trustee for his breach of the trust obligation. As Professor Langdell tersely phrased the argument, "If equitable rights were rights *in rem* they would follow the res into the hands of a purchaser for value and without

notice." [1] This is the gist of the contention of those numerous and distinguished jurists who hold with Langdell, Ames, Holland, and Maitland that albeit the rights of cestui resemble with deceptive closeness genuine rights *in rem*, they are still essentially only rights *in personam*.[2] It is of course true that if a purchaser for value, in good faith and without notice, *acquires the legal title* to the trust *res*, cestui's estate in the property will not be protected against him, even if the trustee by parting with the legal title had intentionally violated his duty to cestui que trust. For this violation of duty cestui has a remedy against the trustee, but he cannot reclaim the trust *res* from the bona fide purchaser of the legal title. Hence, it is argued, we may arrive at a conception of the right of cestui. It is a personal one against the trustee, and it is not a right *in rem*, since, as anyone may be a bona fide purchaser, there are an indefinite number of persons against whom the rights of cestui cannot be enforced.[3]

But of course it will be admitted that the existence of a personal right against the trustee — a genuine obligation-right — may be consistent with the possession by cestui of rights *in rem* also. He may have a personal right against the trustee and property rights in the *res*, just as a principal has rights *in personam* against his agent and rights *in rem* against persons generally as to the property he has entrusted to that agent. It is not determinative of the question whether or not cestui has rights *in rem*, that he has also rights *in personam* against his trustee.

We have thus perhaps cleared the ground for an examination of the doctrine that a bona fide purchaser for value of the legal title takes the property in which cestui was beneficially interested free of any claim by cestui que trust. It is

[1] 1 *Harv. Law Rev.* 60.

[2] See Collection of authorities by Mr. Hart in his article: The Place of the Trust in Jurisprudence, 28 *Law Quart. Rev.* 290 (1912).

[3] Cf. Hart, The Place of the Trust in Jurisprudence, 28 *Law Quart. Rev.* 290.

important to notice that the doctrine involves both the *bona fides* of the purchaser and the obtaining by him of legal title, or at least of the best right to call for it. *Bona fides* on the part of the purchaser is insufficient if all he has bought is an equitable title. It is obviously, then, the acquisition of the legal title in good faith that overthrows the rights of cestui que trust. Free the matter of the complications introduced by the respect which a court of equity pays to the legal title — a doctrine quite independent of the doctrine of bona fide purchaser, and resting on an entirely distinct historical basis[1] — and we find, not that the bona fide purchaser of an equitable estate gets a claim which will prevail against prior equitable holders, nor that their equities will be cut off by the transfer to him for value without notice, but on the contrary that the first equitable owner's rights are paramount unless doctrines as to estoppel, notice, or registration come in.

But the argument that cestui's rights are purely personal ones against the trustee is based upon a special interpretation of the bona fide purchaser doctrine which is inconsistent with these latter cases. That interpretation is as follows: the reason why equity in any case disregards the claims of the nominal owner against the equitable owner is an ethical one. Mr. Ames puts it thus:[2] " Equity decrees that the defendant surrender what in justice he cannot keep. A decree against a *mala fide* purchaser or a volunteer is obviously just, but a decree against an innocent purchaser who has acquired the legal title to the res would be obviously unjust." Here, as generally, the saving phrase of " the legal title " emerges but the argument is clearly independent of this. It is the *bona fides* of the purchaser which determines that equity will safeguard him against cestui que trust whose trustee has betrayed his trust. Cestui, having no rights as to the trust *res* against people generally, but only personal rights

[1] *Vide infra* p. 131 *et seq.* [2] *Lectures on Legal History*, 76.

against his trustee or those in collusion with him either actually or by imputation of law because claiming through him, is now relegated for redress to the enforcement against the trustee of the remedial rights the law gives him for the infringement of the trust obligation.

That this interpretation of the personal view is a fair one is shown by Professor Ames's later treatment of the subject. In his article on Purchase for Value without Notice,[1] he sets forth in fuller form his doctrine.

> A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. In all other cases the circumstance of innocent purchase is a fact of no legal significance.
>
> The rule just given is simply an application of that comprehensive principle which lies at the foundation of constructive trusts and other equitable obligations created by operation of law . . . namely, that a court of equity will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense. Indeed, it is not too much to say that the purchaser of a title from one who holds it subject to an equity is always charged, if chargeable at all, as a constructive trustee. If he acquired the title with notice of another's equity his acquisition was dishonest, and he must, of course, surrender it. If he gave no value, though his acquisition was honest, his retention of the title, after knowledge of the equity, is plainly dishonest. If he gave value, and had no notice of the equity, it is eminently just for him to keep what he has got.

Here we see the real bearing of the doctrine of bona fide purchaser: — it is an application of the old doctrine of privity. It is not unconscientious for a bona fide purchaser for value without notice to hold a trust *res*, because he does not claim under the trustee. He therefore gets a better right than cestui, who can claim only through the trustee,

[1] *Lectures on Legal History*, 253; reprinted from *Harv. Law Rev.* for April, 1887, with MS. additions by the author.

who was bound by a trust obligation to hold for him. But, to repeat: if this were true the doctrine should apply not only equally but *a fortiori* to the bona fide purchaser of an equitable title. It is elementary that equitable rights may be held in trust. Now, if a bona fide purchaser for value of a legal estate is preferred in equity to cestui que trust of the property the legal title to which he purchased, and is preferred because of his superior equity — the bona fide acquisition of the title, — then it would seem *a fortiori* true that the bona fide purchaser of an equitable estate (e. g., an equity of redemption held in trust) should be preferred to cestui que trust of this equitable estate. A court of equity surely would have a greater duty to throw the protection of its bona fide purchaser doctrine over the purchaser of a right recognized only or primarily in equity. But as a matter of fact, the great weight of authority is to the effect that when a court of equity has to decide between two equitable titles, as for instance where T, being trustee for C of an equity of redemption, sells it to B, a bona fide purchaser for value without notice, the purchaser's good faith avails him nothing. He cannot set up against C that he is a bona fide purchaser for value. In other words, the right that C has is not merely one against T but also against B, despite the fact that it would not be unjust for B to retain what he had innocently purchased, — or, as Mr. Ames puts it, even " eminently just for him to keep what he has got." Strip the problem of the complicating circumstances of the acquisition of the legal title and the true proprietary character of C's rights appears.

Thus in the case of Cory *v.* Eyre,[1] the Duke of Buckingham was equitable owner of certain lands, the legal title being vested in encumbrancers who had advanced him large sums on the security of the estates. He borrowed further sums from one Sadlier, who took a mortgage of Buckingham's

[1] (1863) 1 De G. J. & Sm. 149.

equitable estate and declared himself a trustee for Eyre. Sadlier later transferred the mortgage to Cory, a purchaser for value without notice, and delivered the deed to him. It was held, in the absence of evidence that Eyre had notice of the dealings of Sadlier with the security, that Eyre, cestui que trust, was entitled to priority over Cory, the bona fide purchaser.

The theory that the rights of cestui que trust are rights *in rem* furnishes the only adequate rational explanation of the doctrine of the case, that equities rank in order of time. In the words of Turner, L. J. (p. 167):

> Questions of priority between equitable encumbrancers (and the encumbrances both of the plaintiffs and of the defendants in this case are equitable, the legal estate being . . . outstanding) are in general governed by the rule, *qui prior est tempore potior est jure;* and in determining cases depending on the rule we must of course look at the principle on which the rule is founded. It is founded, as I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favor the trust is created or declared. Where, therefore, it is sought as in the present case, to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it.

What such a case would be is well set forth in the opinions of Lord Chancellor Cairns and Lords Hatherley and O'Hagan in the important case of The Directors of the Shropshire Rys., etc. Co. *v.* the Queen.[1] In that case one Holyoake, who held in his name shares of stock in trust for the defendant directors, had deposited the certificates with one Robson for security, and had covenanted to secure a legal mortgage of the shares on request. Robson's widow applied for a mandamus to compel the defendant to transfer the stock to

[1] (1875) L. R. 7 H. of L. 496.

her name. Robson had acted bona fide, and was without knowledge or notice of the fact that Holyoake was only a trustee. The court found that, in Lord O'Hagan's words, they had before them "a net and naked question arising upon a conflict of equitable interests" (p. 514). Lord Hatherley referred to Cory *v.* Eyre (*supra*) as laying down "very justly the principle in these matters," and continued:

> In the eyes of a court of equity the cestuis que trust (in this case the defendants) are the owners of the property . . . The only question to ask oneself in these cases is, what has been the conduct of the real owner in equity, the person who has possessed the interest? Has he forfeited his right? (pp. 511–512.)

The ways in which cestui que trust, the real owner, might forfeit his right were briefly put by Lord O'Hagan (p. 514):

> On the cases we must find in their proceedings something of misconduct or fraud or negligence, to justify the postponement of their claim.

Or, as Lord Chancellor Cairns phrased it, (pp. 506–507):

> That pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and inure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.

No case in the books brings out more clearly than this one the fact that the superior claim of the bona fide purchaser is due to the respect paid in a court of equity to the holder of the legal title. This opinion of Lord Chancellor Cairns is

the classic exposition of the true relationship between the trustee, cestui, and the bona fide purchaser. He says (pp. 505–506):

> The defendants had the whole beneficial interest in the stock. . . . Theirs was the equitable title. Holyoake (the trustee) was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the defendants. On the other hand, any person with whom Holyoake might deal . . . had, or ought to have had, these considerations in mind. He ought to have known that . . . it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with Holyoake, and if it turned out that the beneficial ownership of Holyoake was coincident and co-extensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But if . . . it should turn out that Holyoake's beneficial interest was either *nil*, or was not co-extensive with the whole of his apparent legal title, then I say any person dealing with Holyoake, by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, . . . he had only to take Holyoake at his word. If Holyoake represented that he was the real owner of these shares, the proposed transferee had only to go . . . to the company, and to require a transfer of those shares from the name of Holyoake to his own name. If he had obtained that transfer, and the company had made it, no question could have arisen, and no litigation could subsequently have taken place.

But Lord Cairns is not only definite on the proprietary interest of cestui que trust in the property held in trust. He is also definite in his repudiation of the idea that a trustee has such control of the property interest that one who in good faith acquires the trustee's interest in equity has a superior

claim to the property over cestui. He describes the argument for the priority of the bona fide purchasers over the equitable owners as amounting to a statement that a person who was entitled to the whole equitable interest ought not to have a trustee at all holding the indicia of a legal ownership, or if he did choose to have such a trustee he must be in danger of suffering for every act of improper conduct by that trustee, and would be bound, for instance, in the case of a share standing in a trustee's name, "not merely by a valid *legal*[1] transfer of that share by the trustee, but by any equitable dealing or contract which the trustee might choose to enter into." "My Lords," he continues, "that is a very serious proposition;" and he finds, he says, no authority for such a proposition. (p. 507.)

These cases represent not only the English but also the clear weight of American authority.[2] They amount, it is submitted, to a demonstration that it is not because equity feels that a bona fide purchaser has a superior equity, by virtue of his independence of the trustee's duty, that he is permitted, in case he has acquired the legal title, to take free of any claim, but merely because he has acquired the legal title from one who has been given a power to transfer it, and because equity respects such legal title as superior to the equitable title which a court of equity otherwise upholds in cestui.

Further light is thrown on the real nature of the doctrine of bona fide purchaser by an examination of the limits within which a plea of bona fide purchase for value without notice is a valid defence against the assertion of cestui's right. It is necessary, in the first place, that the bona fide purchaser must have actually acquired the legal title by having conveyance made to him. The drawing of the articles of convey-

[1] Italics supplied by the author.

[2] See cases collected in Ames, *Cases on Trusts*, 305, n.

ance is insufficient.[1] So again, even if the purchase money has been paid, the equitable owner will still be protected against the purchaser if the latter receives notice of the situation before the conveyance has been made.[2] The insistence on the acquisition of the legal title thus illustrated shows again the really important element in the doctrine under discussion. The purchaser is innocent. He has made his contract, or has even paid his money, in good faith. It can hardly be argued that it would be inequitable for him to claim whatever the trustee had. But he gets no equitable ownership of the trust property from his transaction with the trustee — all he has is his claim against the trustee personally. The real property right of cestui in the trust prevails. It is submitted that not only the *ratio decidendi* of the cases, but also the very language of the decisions, where they do more than state the rule, support this view.[3]

Purchase, too, is insufficient unless the purchase money has actually been paid before the purchaser receives notice of cestui's rights. His good faith is no less than if the transaction had been a cash one, but value has not been passed.[4] Moreover, not only value but the entire value agreed upon must be paid over before notice is received. Partial payment in good faith, at least by the great weight of American authority, is sufficient only to give the purchaser who learns of the trust before completing his payment a lien on the property, a right against the equitable owner for reimbursement of what he paid in good faith.[5]

[1] Brandlyn *v.* Ord, (1738) 1 Atk. 571.

[2] Wigg *v.* Wigg, (1739) 1 Atk. 384; and cases collected in Ames, *Cases on Trusts* (2d ed.) 288.

[3] Cf. Jones *v.* Stanley, (1731) 2 Eq. Abr. 685, pl. 9; Villa *v.* Rodriguez, (1870) 12 Wall. 323, 338; Wood *v.* Mann, (1833) 1 Sumn. 506, 509, per Story, J.; and cf. also language of Sir Samuel Romilly, of counsel, in Mackreth *v.* Simmons, (1808) 15 Ves. 329, 335.

[4] Tourville *v.* Naish, (1734) 3 P. W. 306.

[5] Tourville *v.* Naish, (1734) 3 P. W. 306, 307; Florence Co. *v.* Zeigler, (1877) 58 Ala. 221; and other cases collected in Ames, *Cases on Trusts*, 288.

One is forced, then, to seek some other explanation of the doctrine of bona fide purchase than that it is an effort on the part of courts of equity to protect the interest of one who had acquired a right in the land which it was not inequitable for him to retain. Such an explanation fails in two particulars. It is, as we have endeavored to show, an inaccurate account of the reasons why cestui loses his rights as beneficiary of the trust. Furthermore, it is an inadequate account of the extent and purpose of the doctrine of bona fide purchaser. It does not explain the fact that some purely legal rights, admittedly rights *in rem*, also fall before a bona fide purchaser. No theory of equitable dealings or of the limits of what is and what is not conscientious action explains the doctrine that the bona fide purchaser of a chattel in market overt acquires title, free of the claims of even a legal owner; [1] or the doctrine that one who has in good faith received money in payment of a debt [2] or who has in good faith taken a negotiable instrument for value,[3] acquires good title to the money or the negotiable instrument. These are all doctrines indigenous in the common law. And similar doctrines, though not native there, have been naturalized from equity and are now fully recognized as common-law doctrines. A bona fide purchaser for value of goods from one who acquired them under a contract which could be avoided by the original owner takes free of the original owner's rights, if he has no notice of them at the time of his purchase.[4] If a purchaser of goods leaves them in the possession of the vendor, an innocent purchaser from the vendor in possession in many jurisdictions gets a title good against everyone, including the former purchaser.[5] If a principal gives to his agent a power

[1] Case of Market Overt, (1595) 5 Co. Rep. 83*b*. (Cf. *French Civil Code*, § 2280).

[2] Higgs *v.* Holiday, (1578) Cro. Eliz. 746.

[3] Anon., (1697) 1 Salk. 126. [4] Parker *v.* Patrick, (1793) 5 T. R. 175.

[5] See Mechem, *Sales*, §§ 167, 981, 982. Compare *Sale of Goods Act*, 56 & 57 Vict. c. 71 § 25 (1); *Sales Act* (American) § 25.

to sell the former's property, but limits the agent's authority by special instructions, one who in good faith purchases in ignorance of these contract limitations on the agent's power acquires a title even against the principal.[1]

Statutes have still further extended this power of one who has not himself title to property to give to the person who in good faith purchases from him for valuable consideration, a title good against even the original owner. Thus Factors' Acts, now very general, provide that under certain circumstances specified in the acts bona fide purchasers may get a title to property which has been dealt with by factors in violation of their duty to their principal.[2] Bills of Lading Acts have given wider scope to the doctrine of negotiability of such commercial instruments as bills of lading and warehouse receipts.[3] A beginning has been made toward similar legislation with respect to shares of stock. Perhaps, however, the closest parallel to the situation in the case of trusts is found in that which may arise under modern recording acts. A transferor of land who has made a valid transfer of title out of him, by a proper instrument, to one transferee, may wrongfully give a second deed to a bona fide purchaser, which, on being registered under the provisions of the recording act, will yet give good title to the bona fide purchaser if recorded sooner than the deed given to the earlier transferee.[4]

In all these cases it is an earlier legal title which is cut off, and the courts of common law will recognize the validity of the bona fide purchaser's later title. Nor will it be denied that the possessor of the earlier title was the possessor of rights *in rem*.

[1] See Mechem, *Agency* (2d ed.) § 710.

[2] See Williston, *Sales*, §§ 318–322 summarizing and discussing the English and American legislation.

[3] Williston, *Sales*, §§ 406–407.

[4] See Tiffany, *The Modern Law of Real Property*, § 476 *et seq.*

Two ideas result from a consideration of these cases. In the first place, it should be clear, as indeed Professor Maitland admitted,[1] that the essence of a right *in rem* is not that it is good against all the world, including even a bona fide purchaser for value. It is sufficient if it is good generally against an indefinite number, as distinguished from those available only against specific persons.[2] The rights lost as well as those gained in the cases just discussed were all really rights *in rem*. Professor Maitland himself cites the case of the owner of goods who loses his legal title by a sale in market overt or by a sale by a dishonest factor under the conditions set forth in the Factors' Acts as cases where rights *in rem* are cut off by a bona fide purchase.

"But," he says, "really there is a marked difference between the two cases — in that of the sale in market overt the buyer gets ownership, but we do not conceive that he gets it from the seller, for the seller never had ownership; while the rule about the effect of a purchase in rendering equitable rights unenforceable is based on this, that the trustee has ownership, and transfers it to the purchaser, and that there is no reason for taking away from the purchaser the legal right which has thus been transferred to him."[3]

But one may ask whether this difference is relevant to the point under discussion. The point of comparison is that in all the cases cited rights can fail to operate against a particular individual and yet be none the less rights *in rem*. The question of the way in which the ownership of the property transferred comes to the purchaser is beside the point here.[4]

[1] *Equity*, 142–143.

[2] Cf. Austin, *Jurisprudence* (5th ed.) I, 370; Salmond, *Jurisprudence* (3d ed.) 205–209.

[3] *Equity*, 142–143.

[4] Indeed the statement that the trustee has ownership, (in any sense beyond control of the legal title), and transfers that ownership to the purchaser, is a questionable one in the light of the decisions as to trustees dealing with trusts of equitable estates. See pp. 117–121 *supra*. Here, as in the common-law cases, the law, not the vendor, transfers to the bona fide purchaser an estate greater than that of the vendor.

But has not the last defence of the obligation theory of trusts here been crossed? Rights may be rights *in rem* even though on some particular individuals (such as the bona fide purchaser for value of the legal title) they do not impose a correlative duty.

Mr. Salmond puts it thus:

> In defining a real right as one availing against the world at large, it is not meant that the incidence of the correlative duty is absolutely universal, but merely that the duty binds persons in general, and if any one is not bound his case is exceptional.[1]

The real question remaining for explanation is, why is the bona fide purchaser not bound? What is there exceptional about his case? And in the light of the cases just discussed the explanation seems clear. Various reasons will account for particular ones among these cases. Thus the doctrine of estoppel is often appealed to, with perhaps doubtful success, in order to explain the power of the agent or factor to transfer title to his principal's property.[2] An element akin to estoppel may perhaps be felt in the defeat of the unrecorded conveyance by the diligent and bona fide purchaser. But the estoppel element is extremely slight, and may be entirely absent, in the case of the transfer of negotiable instruments or of property by means of bills of lading, warehouse receipts, or stock certificates. Here the larger social reason behind all these cases emerges into view. The basis of the doctrine of bona fide purchaser is not a principle confined to its recognition in courts of equity, and availing to cut off equitable titles only, but one which runs through the whole fabric of modern law: — an effort to ensure security in commercial transactions and acquisitions by

[1] *Jurisprudence* (3d ed.) 208.

[2] See Ewart, *Estoppel*, Chaps. XXII, XXIII, XXVI; Huffcut, *Agency*, *passim*, especially, 62–71; and cf. articles by Professor Cook, 5 *Columbia Law Review* 36, 6 *Ibid.*, 34; and Mr. Ewart, 5 *Ibid.*, 354 and 456.

imposing certain responsibilities on owners of property with respect to that property as a price of legal protection to their interests in it. The French law in its doctrine, *Possession vaut titre*,[1] has only gone one step farther in developing the idea that in a mercantile community, where exchanges are the most characteristic and significant feature of its economy, it is more important for the law to protect the dynamic institution of exchange by granting certain and safe acquisition of ownership than to protect the static institution of property by conferring security of title. *Caveat emptor* is being modified by the change in social conditions into *caveat dominus*: Let the owner take care in the selection and supervision of his agent; let him watch the conduct of his trustee, at the risk of losing his property rights through their wrongdoing, if the transaction they carry through is with a bona fide purchaser.[2] The owner, at least in the case of commodities, is in a better position to assume this risk than the purchaser; and now that recording acts are general in the United States, at any rate, the owner of land when he is laid under a duty of placing his title on the public record is placed under no greater burden of diligence than he ought, in the cause of social security, to assume.

It is to the task of preserving a proper balance between these conflicting sets of interests that a major part of the law of an economic civilization must be directed; and in the fluctuating boundary line between protecting the security of enjoyment of ownership and protecting the security of acquisition of ownership that one may trace the gradual

[1] *Civil Code*, §§ 2279–2280 and cf. § 1141.

[2] Cf. Kohler, *Philosophy of Law* (Albrecht's trans.) 130: "It is a complete mistake to assume that the Roman principle, according to which no one can transfer more rights than he himself has, is a universally applicable one, rooted in the nature of the matter. That can only be asserted by a superficial legal view. On the contrary, it is very easily possible that the successor may acquire more rights than his predecessor had; and just in this lies that peculiarity on which the security of commerce is based." Cf. also, *Ibid.*, 133.

evolution of public policy by the slow process of experimentation.

The protection granted the bona fide purchaser both in law and equity has not always been the same. At times it has been greater than it is today. At one time equity would not grant any relief against a bona fide purchaser *with* notice.[1] But the law has been definitely otherwise at least since Phillips *v.* Phillips.[2] In America, moreover, the reprehensible doctrine of *tabula in naufragio* [3] never obtained a foothold. Even in England some of its extremer applications have been exscinded [4] and it may not long survive.

While on the one hand the responsibility of selection and supervision of agent or trustee is imposed on the *dominus* (whether legal owner as in the case of the principal, or equitable owner as in the case of cestui) to assist, by insuring proper care on the owner's part over his representatives, in the protection of the person who may deal with them for the property owned; on the other hand elaborate doctrines of constructive notice have been formulated to secure a due amount of care on the part of the buyer. In the definitions of what constitutes constructive notice, found both in legal decisions and in statutes, there appears revealed perhaps more clearly than elsewhere the essential character of the bona fide purchaser doctrine. Equity requires not only *bona fides* of one who acquired a legal title, but also a high degree of business prudence. He must, to entitle him to his defence, have made such inquiries and inspections as a careful man of business would, in view of the nature of the transac-

[1] Cf. Sugden, *Vendor and Purchaser* (14th ed.) 791–798; and see Ames, *Lectures in Legal History*, 253.

[2] (1861) 4 De. G. F. & J. 208.

[3] Ames, *loc. cit.* 267. This was the doctrine that a bona fide purchaser of a later equity without notice of a prior one could protect himself against the earlier claim by acquiring for value, or even without consideration, without or even with notice, an outstanding legal estate. Cf. Willoughby, *The Legal Estate*, ch. 3–5.

[4] Ames, *loc. cit.*, 267 and cases in n. 3.

tion.[1] So high a standard, indeed, was set by English courts of equity that Maitland dryly remarks: "In reading some of the cases about constructive notice we may be inclined to say that equity demanded not the care of the most prudent father of a family, but the care of the most prudent solicitor of a family, aided by the skill of the most expert conveyancer."[2] As a result of the severity of the equitable doctrine, Parliament interfered and attempted to limit by statutory definition the cases in which the purchaser should be held prejudicially affected by notice.[3] Here, again, the desire to make conditions of business fairest and most encouraging to commercial dealings becomes apparent as the influence which has moulded and remoulded the legal doctrine to make it fit accurately the existing economic situation.

This, then, is the only adequate explanation of the doctrine of bona fide purchaser. In the conflict of interests between owners and acquirers of certain special classes of property the free circulation of which is of particular business utility, the social importance of encouraging transactions, of "preventing property from stagnating," has resulted in legal protection of the interests of the bona fide purchaser even at the expense of the property rights of the previous owner.[4] These special classes of property tend to become more numerous as a nation becomes more industrial and commercial in its economy, but they are as yet exceptional.[5] Now, as we have already seen, the mere fact of bona fide purchase is insufficient, in the case of an equitable estate, to give the purchaser priority. He must also have completely acquired the legal title to the property in question, to enable him to assert his

[1] See Agra Bank *v.* Barry, (1874) L. R. 7 H. L. 135, 157.

[2] *Equity*, 124.

[3] Cf. Maitland, *Equity*, 124–129; Lewin, *Trusts* (11th ed.) 1079–1081.

[4] Cf. *In re* Hart, (1912) 3 K. B. 6, 18.

[5] Cf. Farquharson Bros. *v.* King, (1902) A. C. 325, 336–337.

claim against the person beneficially entitled to it. In other words, equitable estates are at present not regarded as of the special sort as to which the encouragement of free exchange is of prime social importance.[1]

§ 3. The Doctrine of the Superiority of the Legal Title

But on the other hand, if the bona fide purchaser does in fact acquire the legal title for value and without notice, he is then protected against cestui. This superior virtue of the legal title, then, requires explanation.[2] Why should the acquisition of the legal title give the bona fide purchaser his advantage over cestui? The reason is the same which in courts of common law gives the bona fide purchaser from an agent clothed with authority to dispose of his principal's property a title to the property he has bought. The possession of legal title by the trustee, like the possession of indicia of title by a factor and of adequate power of attorney under appointment by an agent, clothes him with the power to confer upon a bona fide purchaser better rights than he had

[1] It may be remarked parenthetically that if the public policy of promoting security of acquisition of commodities is strong enough to override in the interest of a bona fide purchaser in certain cases even a legal title with its connoted rights *in rem*, then clearly the equitable interest, which cannot be defeated by a bona fide purchaser unless he have also added to his *bona fides* possession of the legal title, must be a very strongly entrenched interest, and the rights protecting it property rights of perdurable strength — rights genuinely deserving the name of rights *in rem*.

[2] It is this fact which impressed Professor Maitland, and which made him an ardent advocate of the obligation theory of equitable rights. His arguments on the debated question are really directed to showing that the possessor of a legal title acquired in good faith will outrank the holder of the equitable title. "This shows," he repeats more than once, "that the rights concerned are rights of different orders." (*Equity*, 130–131.) But as we have already seen, there are different orders of rights *in rem*, in the sense that as to some classes of *res* a bona fide purchaser has superior rights to the legal owner; in others he has not. Professor Maitland's argument really goes to show that we have here a possibly intermediate class of rights *in rem* between these two classes, good not merely against all the world except a bona fide purchaser, but also against a bona fide purchaser unless he has also acquired the legal title to the trust property.

himself. The trustee's legal title represents no genuine estate of his in the property. It is merely the index of a power to confer ownership of the property in another. He is precisely in equity in the position of the owner of record under a recording act after he has transferred title out of himself. As Cozens-Hardy, M. R., put the matter in Capital and Counties' Bank *v.* Rhodes:[1] "The transfer by registered disposition takes effect by virtue of an overriding power and not by virtue of any estate in the registered proprietor."

To carry out the purposes for which the trust was created, the trustee has been clothed with legal title to the trust property, and this carries with it the power to abuse the confidence reposed in him. The legal title of the trustee is a possible source of harm to innocent dealers with him, and it is to protect those who in good faith and for value acquire the legal title from him in the belief that they are acquiring the equitable estate also, that the law lays on the beneficiary of the trust in such a situation the risk of loss from betrayal by his representative. This is the measured price he pays for the advantages he reaps from the trust.

It is desirable, then, to examine somewhat more closely the purpose of the trust as a legal institution, and the function of the trustee. Trusts are a legally recognized institution because they afford an effective method of safeguarding the interests of persons who for some reason cannot efficiently protect them themselves. The trustee is selected because of his intellectual and moral competence to guard and foster these interests on behalf of their possessor. The function of the trustee is, both in origin[2] and in analysis,[3] allied to

[1] (1903) 1 Ch. 633, 655–656.

[2] Cf. Pollock & Maitland, *History of English Law*, II, 228–233.

[3] Cf. Salmond, *Jurisprudence* (3d ed.) 232: "If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. . . . The trustee is clothed with

that of agent. He is under the duty of holding, or perhaps also of administering, the trust *res* for the benefit of his quasi-principal, cestui que trust. It is to enable him properly and efficiently to discharge these duties under the common-law system of judicature that he is invested with the legal title. The historical necessity for such investiture has nowhere been more clearly explained than by Professor Maitland.[1] In substance it is this: The device of the conveyance of his property by a landowner to feoffees to uses enabled him to avoid the oppressive incidents of feudal tenure — reliefs, wardships, and marriages. By law the land was owned by the feoffees; they had taken the place of the lord's former tenant, the feoffor, and the lord could not look behind them: — " it was nothing to him," as Maitland says, " that they were allowing another person to enjoy land which by law was theirs."

To the success of this scheme the vesting of the legal title in the feoffee was imperative. It succeeded just because in the courts of law the beneficial ownership in cestui que use was unrecognized.

" If courts of law," to quote Maitland again, " had begun to say: 'After all this land is the feoffor's land, the feoffees are a mere screen, or the feoffees are merely the feoffor's agents,' then the whole scheme would have broken down — wardship, marriages, forfeitures, escheats, would have followed as a matter of course. But the common law was not prepared to do this. It had no forms of procedure, no forms of thought, which would serve for these cases." [2]

the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large."

Mr. Underhill, in an acute analysis of the difference between a contract and a trust, pointed out that " a trust once finally created is in fact *the equitable equivalent of a common-law gift*, and leaves no right in the creator of it as such, to enforce it; " and finally, concludes that the trustee is an agent of the beneficiary without any duty to the settlor. " In truth," he says, " the latter is a donor, the beneficiaries collectively the donees, and the trustee a sort of stakeholder for them." *Trusts*, 3.

[1] *Lectures on Equity*, 26–29. Cf. Sugden, *Powers*, 4, and cf. also Jenks, *Short History*, 95–97.

[2] *Loc. cit.*, 27–28.

It was then historically of the very essence of the trust relationship that the trustee should have the legal title and the rights, powers, duties and liabilities which this involved. But practically it is also of the essence of this relationship that the trustee is bound to use these rights and powers and bear the burden of these duties and liabilities for the benefit of another. And the holding of the legal title by the trustee was ultimately only a means to this end. The legal estate of the trustee even now is not, as Mr. Jenks [1] and Mr. Willoughby [2] seem sometimes to think, an absolutely useless, superfluous, and indeed justice-defeating thing. It is true that in some of its applications it does injustice — conspicuously for example in the doctrine of *tabula in naufragio* — but these applications of the doctrine are not logically necessary deductions from it.[3] On the other hand, the uses of the legal estate are obvious in the cases where the trust is not executed by the Statute of Uses or according to its analogies. The estate enables the trustee to exercise efficiently the control over the property or the discretion in its management which are the precise reasons for which the settlor established the trust. And even when the legal estate is pretty thoroughly desiccated, there are still justifications for its continuance, neatly suggested in Dr. Willoughby's brilliant essay in the *Law Quarterly Review*: [4]

> Our real property law is like a very untidy bundle done up with a badly worn piece of string. Good or bad, the string is the only thing that holds it together at all. Before you cut the string you must have put a better cord in its place, or be prepared to repack the whole bundle. Now the legal estate is the string — such as it is.

Until a scientific system of property transfer has been constructed, the obtaining of the legal estate is the surest method

[1] See The Legal Estate, 24 *Law Quart. Rev.* 147.

[2] *The Distinctions and Anomalies Arising out of the Equitable Doctrine of the Legal Estate, passim*, but especially vi, 15–16, 18–19, 71–72.

[3] *Vide ante*, p. 129.

[4] 30 *Law Quart. Rev.* 127.

of reaching certainty of ownership which the law permits. And practically there is much to be said for the continuance of a device which, however open to attack from the scientific point of view, actually does enable a bona fide dealer to assure himself of the soundness of his title, and to cut through, even though he cannot disentangle, the complications of conflicting equities.[1]

The common law has always exhibited some fondness for these solvent formulas. As Mr. Willoughby has pointed out in his essay on The Legal Estate,[2] "seisin until quite modern times involved a power to defeat even legal title, just as legal title now involves a power to defeat equitable interests. The tortious feoffment by the party seised of the property is curiously analogous to the wrongful conveyance by a trustee to a purchaser for value." It seems probable that the similarly mechanical method of determining the conflict of interests between different claimants to property by ascertaining who had in good faith acquired completely the legal title from its holder, however wrongful the conveyance on the holder's part, will in time disappear. Originally the distinction between the legal and the equitable title was essential to the success of the trust device. The superiority admitted, even in courts of equity, to the legal title has a historical explanation in the division of jurisdiction between the courts of common law and of equity, with the respect the latter, more or less perforce, paid to the former.[3] It has a present practical explanation in its serviceability as a definite means of arriving at certainty as to ownership. But the possibility of injustice which lurks in the mechanical character of the doctrine forebodes its ultimate disappearance.

[1] For illustration see Shropshire, &c. Co. *v.* The Queen, (1875) L. R. 7 H. L. 496, 511. Cf. J. E. Hogg, The Legal Estate, 22 *Juridical Rev.* 55.

[2] *The Legal Estate*, etc., 16, 17; cf. Holdsworth, *History of English Law*, III, 82, 281; Jenks, *Short History*, 107, 109.

[3] See J. R. *v.* M. P., Y. B. 37 H. VI, f. 13, pl. 3, and Kerly, *History of Equity*, Chap. 7.

The holding of the legal title by the trustee of course enabled him to act in such a way as to injure rather than benefit the interests of cestui que trust with regard to the trust *res*. A part of the price paid for escaping the oppression of the common-law incidents of ownership was this possibility of an abuse of trust by the trustee. To adjust the situation so as to reap the largest possible advantages for cestui from the trusteeship of his property, at the least possible risk of abuse by the trustee of this trusteeship, has been the task of the courts of equity, who first gave legal recognition to the interest of cestui and who have through more than five centuries been fashioning rights and duties to protect that interest.

It is, however, sometimes urged that an analysis of the rights of cestui will show that they are rights purely *in personam*. One must admit that cestui has rights against his trustee which are *in personam* — rights which arise out of the relation between them, just as similar rights *in personam* arise out of the relation between principal and agent. But this is an incomplete analysis of cestui's rights. To-day he has also proprietary rights against people generally.

In his great collection of cases and authorities on Trusts, Dean Ames arranges his cases on the nature of cestui's interest to show first that cestui's claim is purely equitable except where an account would lie at common law.[1] The implied argument seems to be that since his claim lies only in equity it must be one *in personam*.[2] With great respect it is submitted that this argument is an illustration of the tendency to an identification of substantive and remedial rights to which Mr. Justice Holmes refers in his essay on Early English Equity.[3] The form of the remedy has, of

[1] *Cases on Trusts* (2d ed.) 235 *et seq.*

[2] Cf. Langdell in 1 *Harv. Law. Rev.* at 59–60, and Ames, *Lectures on Legal History*, 233–234.

[3] *Select Essays in Anglo-American Legal History*, II, 716.

course, as Mr. Justice Holmes points out, reacted powerfully on the conception of the right; but the property right is not identical with the remedial right to a subpoena by which it is sanctioned — the secondary right *in personam* which arises against the person who violates the primary right *in rem*. The maxim, "Equity acts on the person," is merely a statement as to its method of enforcing its decrees, a method resorted to because of its inability to affect titles directly by its decrees, which do not operate directly upon the property but must be made effective only through coercion of a recalcitrant defendant. This statement as to method does not settle at all the question of whether it will grant this remedial right for breaches of rights *in personam* only or also for breaches of rights *in rem*. The rights of cestui should not be determined by the procedure which has been adopted by the court of equity. Statutes such as this essay discusses now confer in a large number of jurisdictions the power on courts of equity to proceed *in rem*, but the right that is enforced now by proceeding *in rem* is clearly the same right that was before enforceable only *in personam*. A change in procedure cannot affect the nature of the substantive rights enforced. ?

Indeed, if the point deserves further pressing, it may be pointed out that proceedings *in personam* — that is, proceedings designed to create a personal duty against a defendant — are the normal method even in the courts of common law for enforcing rights admittedly *in rem* — general in their nature, — for example, an action of trover against the converter of the plaintiff's ring.[1] And, on the other hand, rights in their nature purely personal may be vindicated through proceedings essentially *in rem*, for example the probating of a will or the selling of property on execution by a sheriff.[2]

[1] See Tyler *v.* The Judges, (1900) 175 Mass. 71.

[2] See Woodruff *v.* Taylor, (1847) 20 Vt. 65, 73, 74–75.

Nor is it conclusive that cestui's rights are purely rights *in personam* against the trustee because they may be enforced regardless of the *situs* of the trust *res*.[1] Equity may and does act *in personam* by imposing a duty in the jurisdiction even when the trust *res* lies outside the territorial jurisdiction of the court. But, as has been indicated, the complete analysis of the trust relation shows that cestui has a right not only *in rem* as to people generally with regard to the trust *res* but also a special right *in personam* against the trustee, correlative to the latter's special duties as trustee to administer the property for the benefit of cestui.[2] The statutes which give courts of equity power to give a real effect to their decrees simply recognize that the procedure which implements fully this right against the trustee personally is an incomplete expression of the substantive rights which the law should acknowledge procedurally, to enable equity adequately to enforce the rights it recognizes when it acts as if cestui were, in the oft-repeated phrase of its judges, " the equitable owner."

It is true that cestui cannot proceed directly against a stranger either at law or in equity. Of course at law the trustee is the owner and must be the one to exercise the owner's rights; even in equity the purpose of the trust relation is that the duties of administering the trust *res* for the benefit of cestui — which include the maintenance of suits against third parties — shall be discharged by the trustee. It is of the essence of the trust relation that cestui is to be represented by the trustee.[3] But the courts recognize that the trustee is after all no more than a representative, that the right which is being enforced is cestui's. This is very clearly demonstrated in the well-known case of Wetmore *v.*

[1] Cf. Ames, *Trusts*, 244 and note.

[2] Cf. Pound, Review of Willoughby, The Legal Estate, 26 *Harv. Law Rev.* 464.

[3] Carey *v.* Brown, (1875) 92 U. S. 171.

Porter.[1] In that case Wetmore, the trustee of certain bonds, wrongfully pledged the bonds to a bank in New York as collateral security for the notes of the firm of Wetmore & Porter. Porter knew that the bonds were trust funds. Porter ordered the bonds to be sold and the proceeds applied to the payment of a firm note. Wetmore brought suit against Porter to recover possession of the funds, and the trial court gave judgment in favor of Porter on a demurrer to plaintiff's complaint. The judgment was based on the doctrine "*Ex turpe causa non oritur actio.*" But the Court of Appeals of New York reversed this judgment on the ground that the action was "sought to be maintained by the plaintiff solely in his representative capacity." Obviously, if the claim which Wetmore had sought to enforce had been his own, he could not have recovered from his fellow wrongdoer by showing his own breach of trust;[2] but since it was really cestui's right of equitable ownership which was being protected by the penitent trustee the suit was permitted. The doctrine of this case is English as well as American law.[3]

It may also be pointed out that if Mr. Ames is correct in his theory that the doctrines of undisclosed principal can be rationalized only by recognizing that the agent of an undisclosed principal is really a trustee for the undisclosed principal as cestui[4] then here the law courts have impliedly lent their support to the doctrine that cestui's rights are real, by permitting the undisclosed principal to sue and be sued on the contracts made by his agent-trustee.[5] The importance

[1] (1883) 92 N. Y. 76.

[2] Cf. Jones *v.* Yates, (1829) 9 B. & C. 532, per Tenterden, C. J.: "We are not aware of any instance in which a person has been allowed as plaintiff, in a court of law, to rescind his own act, on the ground that such an act was a fraud on some other person; for a party seeking to do that has the benefit of his own fraud."

[3] Cf. Franco *v.* Franco, (1796) 3 Ves. Jr. 75.

[4] See *Lectures on Legal History*, 453, reprinted from *Yale Law Jour.* for May, 1909.

[5] See Gibson *v.* Winter, (1833) 2 L. J. (n. s.) K. B. 130.

of this doctrine of the undisclosed principal's right of suit, so often thought to be anomalous,[1] in this connection is really considerable. If Mr. Salmond is right in considering the real legal situation in the trust relation to be that of a special form of agency for cestui as principal,[2] then we see in these cases of undisclosed principal how the law courts deal with the rights of the beneficial owner where their narrow legal categories admit of their recognizing the situation. They let the cestui-principal sue in his own name.[3] In many cases they have let a depositor sue a sub-agent bank for money had and received when the depositor has deposited a note for collection.[4] Even in the case of receivers the Crown was long ago allowed to sue in the Court of Exchequer a deputy appointed by a crown officer. The royal principalship overrode the barrier of the current doctrine of privity even in the exchequer courts.[5] The case of Head *v.* Lord Teynham [6] illustrates the same doctrine of the primacy of cestui's rights. There six children were the beneficiaries of a trust of land limited to trustees for a long term to raise money for the children's portions. Two of the children had assigned their shares to a trustee for the benefit of two of the other children. The question was raised whether this second trustee should be a party to a suit to execute the trust. It was held that as the original trustees of the term and all the children were before the court, it was unnecessary to join the other trustee, and the court directed a sale of the term without his having been made a party. Here pretty clearly the decision can be justified only by recognizing as the court did that the rights involved are those of the children, the ultimate beneficiaries.

[1] Mechem, *Agency* (2d ed.) §§ 1729–1731.
[2] *Jurisprudence* (3d ed.) 232, quoted p. 132, n. 3 *supra*.
[3] Mechem, *loc. cit.*, § 2059.
[4] See cases collected in Ames, *Trusts*, 265.
[5] Cf. The Queen *v.* Painter, (1590) 4 Leon. 32, pl. 89. [6] (1783) 1 Cox 57.

Another place where the garment of trusteeship is worn thin is in the matter of discharging obligations held in trust. Of course at law the discharge must be by the legal owner, the trustee.[1] But in equity a release by cestui que trust having the entire beneficial interest is effectual.[2] Equity, moreover, will set aside the release by the legal owner at the instance of the real owner, cestui; and indeed in some American jurisdictions even common-law courts have treated a trustee's release as a nullity when the obligor acts in bad faith.[3] This is a noteworthy recognition of the actualities of the situation.

So also in the matter of defences open to a third party when sued in a cause of action relating to the trust. At common law of course the suit is the trustee's, and a defence good against the trustee will be a bar.

> The plaintiff, though he sues as trustee of another, must in a court of law be treated in all respects as the party upon the record. If there is a defence against him there is a defence against the cestui que trust who uses his name, and the plaintiff cannot be permitted to say for the benefit of another that his own act was not binding.[4]

This doctrine, confessedly purely formal, is the basis of the common-law permission to the third party defendant to set up against cestui, the real party in interest, a defence good only against the trustee, the party to the record. But as we have seen, the basic doctrine is repudiated in equity.[5] So also in the case of set-off by a third party. While a third party cannot at law plead by way of set-off a debt due him from cestui que trust, such set-off is allowed if the case can be

[1] Parker *v.* Tenant, (1561) Jenkins, Cent. Cases, 22, pl. 25.
[2] Pratt *v.* Dow, (1868) 56 Me. 81.
[3] Roden *v.* Murphy, (1846) 10 Ala. 804; O'Reilly *v.* Miller, (1873) 52 Mo. 210.
[4] Denman, C. J., in Gibson *v.* Winter, (1833) 2 L. J. (n. s.) K. B. 130.
[5] *Vide supra*, p. 139.

got into equity,[1] and also as an equitable bar in common-law actions.[2]

A peculiarly untoward result of considering cestui's rights as purely personal, operating only on the conscience of the trustee, is the doctrine that if the Statute of Limitations has run against a trustee in favor of a third party with respect to the trust *res*, cestui has recourse only against the trustee. So, if a trustee of land should negligently permit a stranger to hold the land adversely for the statutory period, so that he acquired a legal title good against the trustee, cestui would also be barred. Thus Lord Redesdale in Hovenden *v.* Annesley [3] said:

> A cestui que trust is always barred by length of time operating against the trustee. If the trustee does not enter and the cestui que trust does not compel him to enter, as to the person claiming paramount the cestui is barred.

Of course if cestui que trust is *sui juris* when the statute begins to run, the hardship of this rule is at least mitigated by cestui's power to compel the trustee to act. But the rule has been pushed to its logical conclusion, and cestui que trust has been barred even when the adverse occupation began while he was an infant.[4] On the other hand, if the interest of cestui is a real and independent interest the statute should not run against it until the expiration of the additional time allowed for disability. A persistent current of decisions contrary to what must still be admitted to be the

[1] Cf. Clark *v.* Cort, (1840) Cr. & Ph. 154.

[2] Cochrane *v.* Greene, (1860) 9 C. B. (n. s.) 448, and other cases cited by Ames, *Trusts*, 270, note.

[3] (1806) 2 Sch. & Lef. 607, 629; cf. Pentland *v.* Stokes, (1812) 2 B. & B. 68, 75.

[4] Cf. *In re* Scott, (1858) 8 Ir. Ch. 316, 323.

Wych *v.* East India Co., (1734) 3 P. W. 309, usually cited in America for this doctrine (cf. Williams *v.* Otey, (1847) 8 Humph. 563) is inconclusive; for the statute of limitations had run against the trust *res* itself, the debt owed by the company; so that whether cestui's interest in the chose in action was real or personal the case was correctly decided. Cf. Bacon *v.* Gray, (1851) 1 Cush. (Miss.) 140, 144.

weight of authority, at least in America, registers the growing appreciation by the courts of the real character of cestui's rights. As early as 1699 equity relieved cestui whose trustee had during cestui's infancy allowed a third party to enter on the trust estate and levy a fine and non-claim. The report runs: "And although the fine and non-claim was a good bar at law, the legal estate being in the trustees, who were of full age and ought to have entered, yet the plaintiff ought not to suffer for their laches, being an infant." [1] And in a case where trustees had failed to sue on behalf of their cestui, Sir Joseph Jekyll, M. R., said: "The forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the cestuy que trusts, since at that rate it would be in the power of trustees either by doing or delaying to do their duty to affect the rights of other persons." [2] This doctrine of Jekyll's is vigorously upheld in a Mississippi case in 1851 by Chief Justice Starkey,[3] and the Mississippi court has continued to follow the better view,[4] with an apparently growing support in other American jurisdictions.[5]

In 1868 an Irish court seemed to regard the question as an open one,[6] and since Re Nisbet and Potts' Contract [7] the position that the statute as affecting the trustee's estate as against the disseisor would not bar cestui's rights where he has been under a disability within the statutory period,

[1] Allen *v.* Sayer, (1699) 2 Vern. 268, 269. Cf. however a note of the opinion of Parker, L. C., in the Earl *v.* the Countess of Huntington, (1719) 3 P. W. 309, n.

[2] Lechmere *v.* Earl of Carlisle, (1733) 3 P. W. 211, 215. But cf. Lord Manners in Pentland *v.* Stokes, (1812) 2 B. & B. 68, 75.

[3] Bacon *v.* Gray, (1851) 1 Cush. (Miss.) 140.

[4] Cf. Parmele *v.* McGinty, (1876) 52 Miss. 475, 481. But cf. *Miss. Code of 1880*, 2673.

[5] Cf. Hovey *v.* Bradbury, (1896) 112 Cal. 620, 624; Mills *v.* Bleckley, (1898) 51 S. C. 506; Elliott *v.* Lander Machine Co., (1911) 236 Mo. 546.

[6] Quinton *v.* Frith, (1868) 2 Ir. R. Eq. 396, 416.

[7] (1906) 1 Ch. 386 (C. A.); *vide supra*, p. 110.

seems to be a logical inference from the state of the English decisions.[1]

The most important field for testing the real nature of cestui's rights is that of the transfer of cestui's interests to others. But little, however, need be said in addition to what has just been said in connection with cestui's control over his estate and to the earlier discussion of transfers of interests by the trustee.[2] That cestui could transfer his equitable estate freely was a doctrine dating back to the days of uses.[3] But there was a doctrine, supported by the great name of Sugden, to the effect that a court of equity would give no assistance against a purchaser for value without notice [4] and it was argued from this that if A transferred his equitable estate to X and later wrongfully purported to transfer it to Y, who was a bona fide purchaser for value, Y would prevail against X. But in the leading case of Phillips *v.* Phillips [5] it was held that the rule of priority would prevail here as in the case of transfers by trustees.

In that case the equitable owner of a fee simple in certain lands (legal title being in certain encumbrancers) granted an annuity or rent charge out of his equitable estate to plaintiff. Later he married and made a settlement of his equitable interest, under which settlement defendant claimed, having been a purchaser for valuable consideration. The plaintiff sought payment of the annuity. Defendants claimed as bona fide purchasers under good deed. Lord Westbury considered carefully the question of whether the plaintiff's claim could prevail against a bona fide purchaser for valuable consideration without notice, and held it could not; that the grantor having diminished his interest by the annuity, he had left only the estate subject to the annuity and no more.

[1] Cf. also Scott *v.* Scott, (1854) 4 H. L. C. 1065, 1082.
[2] p. 33 *et seq.*
[3] See p. 101, n. 1.
[4] Ames, *Lectures*, 253.
[5] (1861) 4 De G. F. & J., 208.

Clearly, Lord Westbury thought of cestui's interest as a property interest which gave its equitable owner rights *in rem*. If he transferred it he transferred a real interest, if he imposed a burden on it, it was a burden on property, not a mere duty enforceable against the trustee. The interest of the equitable owner of the lands was subjected by him to a subordinate equity, the annuity, and the property he transferred to the bona fide purchaser in the settlement was subject to that equity.

This was not, it is true, a case of a sub-trust imposed on the equitable owner's interest in the property, but an equitable charge — comparable in all relevant particulars with a trust. Mr. Ames supported the principal case on the ground that cestui may transfer a whole or an aliquot part of his interest by an assignment, and if he does so then a second assignment would grant only what cestui had left after his first transfer.[1] This looks very like a theory that cestui's equitable interest is a proprietary one. But Mr. Ames distinguished the case where cestui, instead of making a transfer to X, declared himself a trustee of his equitable interest for X, and then subsequently transferred to Y, a bona fide purchaser for value. In such a case he thought that Y would prevail. He admits that the cases do not go on this theory, and that there are numerous cases inconsistent with it.[2] But on the authorities it is clear that the equitable owner by declaring himself a sub-trustee and thereby passing the beneficial equitable interest out of himself to his sub-cestui could not, since he is not himself possessed of legal title, give to a subsequent bona fide purchaser of his interest any right against cestui of the sub-trust.

Cave *v.* Cave[3] was in effect such a case. There T, a trustee for X, mortgaged the trust property to Y, and so as

[1] *Lectures on Legal History*, 263.

[2] See *loc. cit.*, 264–265.

[3] (1880) 15 Ch. D. 639.

mortgagor became the holder of the equity of redemption in trust for X. He then mortgaged the property to Z, who was ignorant of the earlier transactions and entitled to claim as a bona fide purchaser. Here, on Mr. Ames's theory, Z, who was a bona fide purchaser from T, who held his equity of redemption in trust for X, should take precedence over Y, the prior second mortgagee. But the court held that Y and not X was entitled.[1] Moreover, the court decided the case on the authority and reasoning of Phillips *v.* Phillips, and spoke of equitable charges as similar to other equitable estates for the purpose of aligning the rights of bona fide purchasers.

Nor does the famous case of Dearle *v.* Hall[2] conflict with the general doctrine of the real nature of cestui's right. This case, established for England a rule also widely followed in other jurisdictions,[3] that " where a cestui of purely personal estate makes successive assignments of his equitable interest a later assignee gains priority over an earlier assignee if he had no notice of the earlier assignment when his own was created, by giving prior notice to the trustees in whom the property was vested."[4] The general American doctrine is to the effect that if C, cestui, assigns his right to X and then purports to make a second assignment to Y, a bona fide purchaser for value without notice, X will prevail.[5] This is obviously the pure property doctrine; C has divested himself of his equitable estate by the first assignment, and so Y takes nothing.

But the rule in Dearle *v.* Hall is in reality a judicial provision similar to those legislatively provided in recording acts, — indirect but none the less cogent testimony in favor of

[1] It is interesting to note that Professor Maitland approved of Cave *v.* Cave; see *Equity*, 131.

[2] (1828) 3 Russell 1, 28.

[3] See authorities collected in Ames, *Cases on Trusts*, 326–328, note.

[4] Statement of rule quoted from Ashhurner, *Equity*, 182.

[5] Note 3 above.

protecting a bona fide purchaser in that special class of equitable interests which are subjects of commerce. It is this distinction between a commercial interest, transferability of which is of prime importance, and what is less definitely a commodity of daily transfer, which has led the courts to refuse to extend the rule of Dearle *v.* Hall to real property.[1] But as the rights of a vendee of real estate under an unrecorded deed are none the less rights *in rem* because susceptible of defeat by a prior registration of a later deed by a bona fide purchaser from the vendor, so the rights of a first purchaser of an equitable interest in personal property are none the less real because they may be defeated by prior notice given to the trustees of the property by a later bona fide purchaser for value without notice. That this is the view held by Sir Thomas Plumer, M. R., the author of the rule in Dearle *v.* Hall, is clear from his language.[2]

The cases, then, which involve transfers by cestui of his equitable estate, like those where the legal estate is transferred by the trustee by virtue of his power, show that cestui's interest is regarded as a genuine property interest. It is submitted that the following recent statement by an American judge phrases with accuracy the existing legal situation, as to the rights and powers of both cestui and trustee:

[1] Lee *v.* Howlett, (1856) 2 Kay & J. 531.

[2] Dearle *v.* Hall, (1828) 3 Russ. 1, 20: "If by the first contract all the thing is given there remains nothing to be the subject of the second contract, and priority must decide. . . . They say that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit that if you mean to rely on contract with the individual you do not need to give notice; from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and unless notice is given, you do not do that which is essential in all cases of transfer of personal property. Notice then is necessary to perfect the title — to give a complete right *in rem* and not merely a right as against him who conveys his interest." See also 12–14 and 24.

Under our system the cestui que trust is the real owner of the property, and the trustee merely the depositary of the legal title. His is not a property right but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed but a power that may be exercised.[1]

§ 4. The Present Trend of the Law.

It is but natural that as the burdensome incidents from which the wall of legal title in the feoffees to uses and their successors, the trustees, protected the estate of cestui que trust, grew fewer with the abolition of reliefs, wardship, and marriage, or less likely to arise, as in the case of forfeiture for treason and escheat for felony; and as the disabilities as to disposition of property by gift and will disappeared, the importance of the legal title and the powers and privileges it conferred became less overmastering, and the superior significance and real nature of cestui's interest rose into view. Courts of law, it is true, continued to regard only the form, but equity, looking to the substance of the interests involved, more and more definitely directed its energies not to the restraining of the possibility of abuse of the powers which the trustee possessed by virtue of holding legal title but also to the protection of the interests of cestui, desire for whose benefit was the original cause of the creation of the relationship. Had the courts of common law been less "entangled in the nets of form"— to use the damning phrase of Mansfield[2] — the legal estate of the trustee with its possibilities of injustice might have been reduced to a mere power in law as well as in equity, and the trustee treated there, as on the other side of the court, as the agent which in reality he is. The complexities of the equitable doctrine of bona fide

[1] Hodges, J., in Arnold *v.* South Pine Lumber Co., (1909) 123 S. W. (Tex. C. C. App.) 1162, 1168.

[2] Cf. Doe *v.* Pegge, (1785) 1 Term R. 758, n.

purchaser of the legal title are after all traceable to the separation of jurisdictions.[1]

If a single court administered justice, and were armed with a procedure adequate to complete enforcement of all the rights our system of jurisprudence recognizes, then the equitable rights of property would be treated as legal rights independent of the form in which they originated. The law of property would doubtless have to be further recast, but with the development of a scientific system of transfer of property interests[2] whatever elements of usefulness still reside in the nominal legal estate of the trustee, the mortgagor, and similar holders of power to dispose of title would disappear, and these powers be treated with the directness and absence of fiction with which courts of law deal with agents' powers.[3] The development of a simple, definite, and yet flexible conception of the doctrine of the bona fide purchaser would then be possible.[4]

[1] See Ind, Coope & Co. *v.* Emmerson, (1887) 12 A.C. 300, 306 and cf. 308. Cf. also Bacon, *Reading on the Statute of Uses*, 9, quoted *supra*, p. 98; and Hardwicke, L. C., in Worthy *v.* Birkhead, (1754) 2 Ves. Sr. 571, 573: "It could not happen," (an application of the *tabula in naufragio* doctrine) "in any other country but this: because the jurisdiction of law and equity is administered here in different courts and creates a different kind of rights in estates; and therefore as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, this court never thought fit, that by reason of a prior equity against a man, who had a legal title, that man should be hurt; and this by reason of that force this court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country it could never have made a question; for if the law and equity are administered by the same jurisdiction the rule, *qui prior est tempore potior est jure*, must hold." Cf. also Mansfield in Burgess *v.* Wheate, (1759) 1 Eden 177, 223.

[2] Cf. the earnest efforts in this direction now being made in England, and the current discussions of them, e. g., by Mr. Underhill, in 30 *Law Quart. Rev.* 35–45; 27 *Law Quart. Rev.* 173–179.

[3] Thus for example if the trustee were recognized as essentially an agent, his principal, cestui, would in such a case as Wetmore *v.* Porter (discussed *supra*, p. 139) have a reasonable time after he discovered his agent's fraud to repudiate it, and the statutory period would not be shortened by the period between the trustee's wrong-doing and his repentance.

[4] Cf. Pound, The Decadence of Equity, 5 *Col. Law Rev.* 20, at 29: "The fusion

This development from a dual to a single system of rights, enforced by any appropriate proceeding and by all the powers at the disposal of the judicial branch of the government, is illustrated in the history of the Roman law.[1] Equitable ownership first arose to satisfy the demands of justice denied by the rigidity of the rules of the *jus civile*.[2] The Publician Edict indirectly recognized the validity of equitable ownership, and its subsequent development justified Justinian in taking the final step of making all equitable rights into legal rights.[3]

As Judge Dillon said years ago, in his lectures on the Laws and Jurisprudence of England and America:[4]

> The separation of what we call equity from law was only accidental, or at any rate was unnecessary, and the development of an independent system of equitable rights and remedies is anomalous and rests upon no principle. The continued existence of these two sets of rights and remedies is not only unnecessary but its inevitable effect is to produce confusion and conflict. The existing diversity of rights and remedies must disappear, and be replaced by a uniform system of rights as well as remedies.

of law and equity may have helped in this, as it has certainly helped the law by obviating the circuitous and artificial methods forced upon equity by its history. . . . Just as equitable remedies engrafted upon common-law actions have borne equitable fruit, legal actions made available to equitable claims have borne the legal fruit of direct and straightforward proceedings. Such is the influence of procedure on the substance of the law that this brushing away of the circuitous methods of equity is a great gain to the system."

[1] See Sohm, *Institutes* (Ledlie's trans. 3d ed.) 310–311.

[2] Cf. Gaius II, §§ 40–41 and Poste's commentary thereon.

[3] *Code* VII, 25: "Driving out by this decision a mockery of ancient subtlety, we suffer no difference to exist between owners, among whom the naked legal title (*ex jure Quiritium*) or only the equitable (*in bonis*) is found, because we do not desire any such distinction nor doctrine of title *ex jure Quiritium*, which is a mere vain puzzle, and is never seen and never appears in practice but is a vain and superfluous phrase . . "

Cf. also, outlining the similar development of the civil law doctrine of liens, Salkowski, *Institutionen* (Whitfield's trans.) § 115.

[4] *Laws and Jurisprudence of England and America*, 386, quoted and discussed by Professor Pound, The Decadence of Equity, 5 *Col. Law Rev.* 20, 23.

The experience of England under the Common Law Procedure Acts of 1852, 1854, and 1860, the Chancery Amendment Acts of 1852 and 1858, and the Judicature Act of 1873 with its numerous amending acts, encourages the belief that we may look forward to a time when the anomalies and anachronisms inherited from the dual system of courts long characteristic of the Anglo-American administration of justice will disappear; when all rights will be legal rights, and all alike subject to the same limitations which the judicial doctrine of bona fide purchaser and the statutory provisions of recording acts now almost universal in civilized countries show to be necessary in the interests of commercial intercourse and of business dealings generally.[1]

This discussion can make no pretensions to completeness. The subject is one of vast proportions, and the possible methods of approach are numerous. The writer's apology for going over ground, some of it often traversed before, is that those who have most carefully traced the historical development of the trust idea [2] have been on the whole unsympathetic with his point of view, and seem to him unduly prejudiced by the juristic tradition of Coke, Gilbert, and Sugden against what appears to him to be a clearly

[1] Professor Maitland in 1906 was disposed to underestimate the effect of the union of the courts of chancery and common law into a single court of universal jurisdiction. But the elements he overlooked in his discussion (*Equity*, Lectures I, XI, and XII) have been pointed out by Professor Hohfeld: The Relations of Equity and Law, 11 *Mich. L. R.* 537. Cf. also, Law and Equity — the Test of their Fusion by J. E. Hogg — a discussion of Chapman *v.* Smethurst, (1909) 1 K. B. 73, 937 — 22 *Juridical Review*, 244. For a good instance of the influence of the union, as early as 1891, see Clarke *v.* Ramuz, (1891) 2 Q. B. 456. This was an action brought in the *Queen's Bench Division* by the purchaser of land against the vendor for wrongfully allowing a third person to cart off from the land part of the soil. A judgment for damages for the plaintiff was upheld on the express ground that it was established in equity that the vendor in possession under a contract for the sale of land, but prior to the completion of the conveyance, is a trustee for the purchaser and as such under certain duties to him.

[2] Maitland, *Equity*, 117–121; Jenks, *Modern Land Law*, 141–142, and *Short History of English Law*, 218–220; Lewin, *Law of Trusts*, Introduction, 1–10.

traceable development in the decisions and the statutes of the rights of cestui from rights purely *in personam* to rights definitely *in rem*. It seems strange that great equity lawyers should be at times forgetful of the familiar but important dictum of Sir George Jessel in Re Hallett's Estate:[1]

> The rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time — altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved, and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases.

On the other hand, the tendency to over-simplification which, beginning in Langdell's theory that equity is only a system of remedies, and leading many analytical as well as historical jurists to see in the trust only the personal rights and duties growing out of the obligation which binds the trustee and cestui, overlooking the equally important real rights of cestui with respect to the trust property, — that tendency furnishes some justification for some analysis of the really complex rights and duties of trustee and cestui in the relation of the trust.

As has already been indicated, a similar development is believed to be traceable in the case of other equitable rights. Considerations of space have, however, prevented any

[1] (1879) 13 Ch. D. 696, 710.

adequate treatment of any other than the trust, the most clearly defined and the most important of them all.

In the light of this discussion, the movement toward granting courts administering equitable relief the power to give a real effect to their decrees is seen to fall into place as one step in the really universal movement to adjust procedure to the character of the rights to which it seeks to give effect. The historical relation of procedure and substantive right [1] has been reversed as men have come to rationalize their law. But throughout, the relation of form and substance has of necessity been of the utmost intimacy. The history of the steps by which equity, long hampered by the jealousy of the courts of common law, and then by the rigidifying influence of her own precedents, has pushed forward, — first by the invention of one and then another new writ, and later by winning the aid of the modern law-making organ, the legislature, — to a position where her courts can transfer title to the person they recognize as entitled in right, is but the outer history to which an inner development of the rights she enforces by her decrees corresponds. It is because the rights she recognizes have become rights *in rem* that the remedies she is getting and seeking power to grant are remedies affecting titles.

Some courts, notably that of California, have felt that the inherent powers of courts of equity jurisdiction, at least in a code state, were sufficient without special statutory authority to enable such courts to transfer title by virtue of their decree. But a statute makes the matter sure. The cautious words of Lord Blackburn in Jennings *v.* Jordan [2] may well be borne in mind:

> Some of the rules acted on in courts of equity in the kindred subject of tacking securities on the same property are founded upon this, that a mortgage, after the time specified for redemption had expired,

[1] Maine, *Early Law and Custom*, 389. [2] (1881) 6 App. Cas. 698, 714.

was an absolute estate, which no doubt it was at law; and that the equity of redemption was only a personal equity to take away the legal estate from him in whom it was vested, which perhaps it originally was. It would seem that now, after equitable estates have been treated and dealt with for a very long time as, to all other intents, estates, any rule founded on the antiquated law ought to be no longer applicable, and that *cessante ratione, cessare debet et lex*; but some rules apparently founded upon this antiquated law have been so uniformly and long acted upon that they must be treated as still binding . . . and now after the lapse of nearly a century and a half more, I think only the legislature can do away with this rule.

Such a statute as is argued for in this essay would set at rest the doubts of conservative judges as to their powers. Moreover, it would be a statute which would take a permanent place in our legal system. This is assured not only because such statutes dealing with large portions of the subject have already in many jurisdictions stood the test of over a century in practice, but also because they are the legislative embodiment of the result of a genuine jural evolution.

APPENDIX

APPENDIX OF STATUTES

ALABAMA: Alabama Civil Code, 1907.

Section 3211. When a decree is made for a conveyance, release, or acquittance, and the party against whom the decree is made does not execute the same by the time specified in the decree, such decree operates in all respects as fully as if the conveyance, release, or acquittance, was made; or the court may decree, in default of the execution of such conveyance, release, or acquittance, the same to be executed by the register or a commissioner in the name of the party; and the conveyance, release, or acquittance, when so executed, is as valid in all respects as if executed by the party; or the court may directly divest title out of one party and vest it in another.

Section 3220. A final decree of partition is operative to vest title, though releases or conveyances are not executed.

ALASKA: Compiled Laws of Alaska, 1913.

Section 1213. A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party do not comply therewith, be deemed and taken to be equivalent thereto. The court or judge thereof may enforce an order or judgment in an action of an equitable nature, other than for the payment of money, by punishing the party refusing or neglecting to comply therewith, as for a contempt.

ARIZONA: Revised Statutes of 1901.

Section 1430. When the judgment is for the conveyance of real estate, or for the delivery of personal property, the decree may pass the title to such property without any act to be done on the part of the party against whom the judgment is rendered.

ARKANSAS: Kirby's Digest, 1904.

Section 4476. In all cases where the court may decree the conveyance of real estate or the delivery of personal property, they may by decree pass title of such property without any act to be done on the part of the defendant where it shall be proper, and may issue a writ of possession if necessary to put the party in possession of such real or personal property, or may proceed by attachment or sequestration.

Section 4477. When an unconditional decree shall be made for a conveyance, release, or acquittance and the party required to execute the same shall not comply therewith, the decree shall be considered and taken to have the same operation and effect and be as available as if the conveyance, release, or acquittance had been executed conformably to the decree. (R.S., c. 23, Sections 123 and 124). (1837, Chancery Act, Sections 123 and 124).

Section 4478. [Such decree as to real estate shall be recorded.]

CALIFORNIA: Code of Civil Procedure (Deering's Ed., 1909, and Supplement of 1911).

Section 572. When it is admitted by the pleading, or shown upon examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Section 573. If the money is deposited in court it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe-keeping of the money deposited with him the treasurer is liable on his official bond.

Section 574. Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money, or other thing, and the order is disobeyed, the court, beside punishing the disobedience, may make an order requiring the sheriff to take the money, or thing, and deposit or deliver it in conformity with the direction of the court.

Section 684. When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part;

When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith;

When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served

upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

Section 738. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given.

Section 749. An action may be brought to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for twenty years prior to the filing of the complaint, claiming to own the same in fee against the whole world and who has paid all taxes of every kind levied or assessed against the property during the period of five years continuously next preceding the filing of the complaint.

Said action shall be commenced by the filing of a verified complaint averring the matters above enumerated. The said complaint may include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known to the plaintiff to have, some claim or cloud on the lands described in the complaint adverse to plaintiff's ownership, or other persons unknown claiming any right, interest or lien in such lands, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto."

Within ten days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action,

containing the matters required by section four hundred and nine of this code.

Section 751. When the summons has been served as provided in the preceding section and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law.

The court before proceeding to hear the case must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed. The judgment after it has become final is conclusive against all the persons named in the summons and complaint who have been served and against all unknown persons as stated in the complaint and summons who have been served by publication, but shall not be conclusive against the State of California or the United States.

Said judgment shall have the effect of a judgment *in rem* except as against the State of California and the United States; and provided further, that the said judgment shall not bind or be conclusive against any person claiming any estate, title, right, possession or lien to the property under the plaintiff or his predecessors in interest, which claim, lien, estate or right of possession has arisen or been created by the plaintiff or his predecessors in interest within twenty years prior to the filing of the complaint.

The remedy provided in this and the two preceding sections shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding now allowed by law.

Section 766. The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive;

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a

particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons not in being at the time said judgment is entered, who have any interest in the property divided, or any part thereof, as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property; provided, that in case sale has been made under the provisions of this chapter the judgment shall provide for keeping intact the share of the proceeds of said sale, to which said party or parties not in being at the time are or may be entitled until such time as such party or parties may take possession thereof;

3. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

4. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death. If during the pendency of the action, and before final judgment therein, any of the co-tenants has conveyed to another person his interest, or any part of his interest, such conveyance, whatever its form, shall be deemed to have passed to the grantee any lands which, after its execution, may have been set aside to the grantor in severalty, or such proportionate interest in such lands as the interest so conveyed bears to the whole interest of the grantor.

Compare Section 187. When jurisdiction is by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

COLORADO: Colorado Revised Statutes, 1908.

Section 1408. In all actions pending in any court of record of this state or which may hereafter be brought in any such court, wherein any

defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought for the enforcement of an express, implied, or resulting trust, or for the removal of cloud from title to real estate, or for specific performance, or for the establishment of a lost or destroyed deed, conveyance or instrument in writing, or for the establishment and proof of any conveyance, deed or instrument in writing not properly proved and acknowledged, or in any other proceeding *in rem*, or affecting only specific property, where, according to the usual practice in courts of chancery, the court, if the defendant had been personally served, might direct or decree any act to be done or performed by the defendant in favor of plaintiff, the court may appoint a trustee for such defendant to do and perform in the place and stead of and for such defendant, the acts required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree.

CONNECTICUT: General Statutes, Revision of 1902.

Section 555. Courts of equitable jurisdiction may pass the title to real estate by decree without any act on the part of the defendant when, in their judgment, it shall be the proper mode to carry the decree into effect; and such decree, having been recorded in the records of lands in the town where such real estate is situated, shall, while in force, be as effectual to transfer the same as the deed of the defendant.

DELAWARE: Laws of Delaware, 1893, Vol. II, p. 708. Chapter 90.

Section 1. When any person now or hereafter seized of lands, tenements or hereditaments, upon any trust shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or shall be insane, or it shall be uncertain where there were several trustees which of them was the survivor or it shall be uncertain whether the trustee last known to have been seized as aforesaid be living or dead, or if known to be dead it shall not be known who are his heirs at law, or if any trustee seized as aforesaid or the heirs at law of any such trustee shall neglect or refuse to convey such lands, tenements or hereditaments to the person entitled to receive such conveyance, for twenty days next after a proper deed for making such conveyance shall have been tendered for his or their execution by the person so entitled or his agent or attorney, the Court of Chancery for the county wherein such lands, tenements, or hereditaments are situ-

ated shall have power to appoint a person to convey the same to such person and in such manner as the court shall direct; and any conveyance so made shall be as effectual to all intents and purposes as if the same had been executed by the trustee or his heirs at law.

Note. (Subsequent sections extend the rule to trustees for a term of years, trustees holding stock and provide for the removal of such disobedient or negligent trustee and an appointment of another trustee in whom the former's title shall vest.)

FLORIDA: General Statutes, 1906.

Section 1902. Where a decree in chancery shall be made for a conveyance, release, or acquittance of land or any interest therein and party against whom the said decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and to be as available as if the conveyance and release or acquittance had been executed, conformably to such decree, and this notwithstanding any disability of such parties by infancy, lunacy, coverture or otherwise.

GEORGIA: Code of 1911, Vol. I.

Section 5356. The decree on a proceeding to partition shall pass the title without the execution of any conveyance by the parties.

Section 5425. A decree for specific performance shall operate as a deed to convey land or other property without any conveyance being executed by the vendor. Such decree certified by the clerk shall be recorded in the registry of deeds in the county where the land lies and shall stand in the place of a deed.

ILLINOIS: Hurd's Revised Statutes, 1913. Chapter 22.

Section 46. Whenever a decree shall be made in any suit in equity, directing the execution of any deed or other writing, it shall be lawful for the court to appoint a commissioner, or direct the master in chancery to execute the same, in case the parties under no disability fail to execute the same, in a time to be named in the decree, or on behalf of minors or persons having conservators; and the execution thereof, by such commissioner or master in chancery, shall be valid in law to pass, release or extinguish the right, title and interest of the party in whose behalf it is executed, as if executed by the party in proper person, and he or she were under no disability; and such deed or other writing, if it relates to land, shall, within six months after its execution by such

commissioner or master, be recorded in the recorder's office of the county wherein the land may lie.

Section 47. When there shall be no direction that a master in chancery or commissioner execute a decree, the same may be carried into effect by execution, or other final process, according to the nature of the case, directed to the sheriff or other officer of the proper county; which, when issued, shall be executed and returned by the sheriff or other officer to whom it may be directed, and shall have the same operation and force as similar writs issued upon a judgment at law. The sheriff, or other officer to whom the same is directed, shall be subject to the like penalties and recoveries for misconduct or neglect in the execution or return thereof, as in cases at law; or the court may, if necessary, direct an attachment to be issued against the party disobeying such decree, and fine or imprison him, or both, in the discretion of the court, and may also direct a sequestration for disobedience of any decree.

INDIANA: Burns's Annotated Indiana Statutes, 1908, Vol. I.

Section 1050. Real property may be conveyed by a commissioner appointed by the court: —

First. Where, by the judgment in an action, a party is ordered to convey real property to another or any interest therein.

Second. Or where real property, or any interest therein, has been sold, and the purchase-money paid.

Section 1051. The deed of the commissioner shall so refer to the judgment authorizing the conveyance, that the same may be readily found, but need not recite the record in the case generally.

Section 1052. A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

Section 1053. A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding.

Section 1054. A conveyance by a commissioner shall not pass any right, until it has been examined and approved by the court; which approval shall be indorsed on the conveyance and recorded with it.

Section 1055. It shall be sufficient for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the names of the parties shall be recited in the body of the conveyance.

Section 1056. The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by parties whose title is conveyed by it.

Section 1057. In case of a judgment to compel a party to execute a conveyance of real estate, the court may enforce the judgment by attachment or sequestration, or appoint a commissioner to make the conveyance.

Section 1058. If the conveyance is made by a commissioner appointed by the court, the following form may be used, viz.: "A.B., commissioner by the order (or judgment) of (naming the court), in the case of (naming the party plaintiff), against (naming the party defendant), (or) on petition of (naming the description of the petitioner as A. B., administrator of C. D.), (or) guardian of (naming the wards), entered in (describe the kind of record, number of volume and page), conveys to E. F. (describe the premises), for (state the consideration)."

IOWA: Code of 1897.

Section 3805. Real property may be conveyed by a commissioner appointed by the court:

1. Where, by judgment in an action, a party is ordered to convey such property to another;

2. Where such property has been sold under a judgment or order of the court, and the purchase price has been paid.

Section 3806. The deed of the commissioner shall refer to the judgment, orders and proceedings authorizing the conveyance.

Section 3807. A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

Section 3808. A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding.

Section 3809. A conveyance by a commissioner shall not pass any right until it has been approved by the court, which approval shall be indorsed on the conveyance and recorded with it.

Section 3810. The conveyance shall be signed by the commissioner only, without affixing the names of the parties whose title is conveyed, but the names of such parties shall be recited in the body of the conveyance.

Section 3811. The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it.

Section 3812. Whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, the judge of the court may, in vacation, approve the same, and cause the proper entry or entries to be made.

KANSAS: General Statutes, 1909.

Section 5993. When a judgment shall be rendered for a conveyance, release or acquittance, in any court of this state, and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such judgment; or the court may order such conveyance, release or acquittance to be executed in the first instance by the sheriff; and such conveyance, release or acquittance so executed shall have the same effect as if executed by the party against whom the judgment was rendered.

KENTUCKY: Carroll's Kentucky Code, 1906.

Section 394. Real property may be conveyed by a commissioner appointed by the court if by a judgment in an action, a party be ordered to convey such property to another. . . .

Section 395. The deed of the commissioner shall refer to the judgment, orders, and proceedings authorizing the conveyance so that the same may be readily found.

Section 396. A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

[Note: Cf. also 397–400, providing for examination and approval by the court, and recording.]

MAINE: Revised Statutes, 1903. Chapter 113.

Section 8. If a person who has contracted in writing to convey real estate dies before making the conveyance, the other party may have a bill in equity in the supreme judicial court to enforce specific performance thereof against his heirs, devisees, executors, or administrators, if commenced within three years from the grant of administration or from the time when he is entitled to such conveyance but not exceeding four years after the grant of administration provided that written notice of the existence of the contract is given to the executor or administrator within one year after the grant of administration.

Section 9. If it appears that the plaintiff is entitled to a conveyance, the court may authorize and require the executor or administrator to convey the estate as the deceased ought to have done; and if any of the heirs or devisees are in the state and competent to act, the court may direct them instead of the executor or administrator to convey the estate or join with either in such conveyance; which conveyance shall pass the estate as fully as if made by the contractor.

Section 10. If the defendant neglects or refuses to convey according to the decree, the court may render judgment for the plaintiff for possession of the land, to hold according to the terms of the intended conveyance and may issue a writ of seisin as in a real action under which the plaintiff having obtained possession shall hold the premises as effectually as if conveyed in pursuance of the decree; or the court may enforce its decree by any other process according to chancery proceedings.

Section 11. If the person entitled to such conveyance dies before bringing his suit or before the conveyance is completed or such seisin and possession are obtained, his heir, devisee, or other person entitled to the estate under him may bring and prosecute such suit and shall be entitled to the conveyance or seisin and possession in like manner as the obligee.

Section 12. If the party to whom any such conveyance was to be made or those claiming under him does not commence a suit as before provided and the heirs of the deceased party are under age or otherwise incompetent to convey the lands contracted for, the executor or administrator of the deceased may file a bill in equity in the supreme judicial court setting forth the contract and circumstances of the case; whereupon the court by its decree may authorize such executor or administrator to convey the estate as the deceased should have done; and such conveyance shall be deemed a performance of the contract on the part of the deceased so as to entitle his heirs, executors, or administrators to demand a performance thereof on the part of the other party.

MARYLAND: Bagby's Annotated Code, 1911, Article XVI.

Section 91. Where a decree has been made for a specific performance of a contract, or the conveyance of land, or for the sale of land, the court passing such decree shall have the same power to execute said decree, or compel a compliance therewith in cases where the land or property lies, or parties reside in different counties from that in

which the decree was passed, as if the said parties resided, or land or property lay in the county where the decree was passed.

Section 94. Where any person dies and leaves real or personal property to be sold for the payment of debts, or other purposes, and shall not appoint any person to sell and convey the same, or if the person appointed dies, or neglects or refuses to execute such trust, the court, upon the petition of any person interested in the sale of such property, may appoint a trustee to sell and convey the same, and apply the money arising from the sale to the purposes intended.

Section 95. In all cases where the court shall decree that a deed of any kind shall be executed, a trustee to execute such deed may be appointed, and until such trustee shall execute a deed, the decree itself, if passed in the county where the land lies, shall have the same effect that the deed would if executed; but if passed in another county, the decree shall have that effect if recorded in the county where the land lies within six months from the date thereof.

MASSACHUSETTS: Revised Laws, 1902. Chapter 147.

Section 17. If a person who is seised or possessed of real or personal property or of an interest therein upon a trust, express or implied, is under the age of twenty-one years, insane, out of the commonwealth, or not amenable to the process of any court therein which has equity powers, and in the opinion of the supreme judicial court, the superior court, or the probate court it is fit that a sale should be made of such property or of an interest therein, or that a conveyance or transfer should be made thereof in order to carry into effect the objects of the trust, the court may order such sale, conveyance or transfer to be made and may appoint a suitable person in the place of such trustee to sell, convey or transfer the same in such manner as it may require. If a person so seised or possessed of an estate or entitled thereto upon a trust is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyances as the court orders.

Section 1. No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by an instrument in writing signed by the party or by the attorney of the party creating or declaring the trust.

Section 6. A new trustee appointed under the provisions of the preceding section, or appointed in the place of a former trustee in conformity with a written instrument creating a trust, shall, upon giving such bond as may be required, have the same powers, rights,

and duties and the same title to the estate, whether as a sole or a joint trustee, as if he had been originally appointed; and the court may order any conveyances to be made by the former trustee or his representatives or by the other remaining trustees which it may find proper or convenient to vest the trust estate in the new trustee either solely or jointly with the others.

Section 7. If a trustee is appointed by the probate court as the successor of a prior trustee, the court may dispense with the making and return of an inventory if it appears to be unnecessary, and in such case the condition of the bond shall be altered accordingly.

Section 8. If an inventory is required to be returned by a trustee, the estate and effects shall be appraised by three suitable persons, who shall be appointed and sworn as is required by law relative to the inventory of the estate of a deceased person.

Section 9. If a trustee who derives his appointment or authority from a court which has no jurisdiction within this commonwealth holds land in this commonwealth in trust for persons resident here he shall, upon petition to the probate court in the county in which the land lies, and after notice, be required to take out letters of trust from said court; and upon his neglect or refusal so to do, the court shall declare such trust vacant, and shall appoint a new trustee, in whom the trust estate shall vest in like manner as if he had been originally appointed or authorized by said court.

Section 10. The notice to the trustee required by the provisions of the preceding section may be given by serving on him a copy of the petition, and of the citation of the court issued thereon, fourteen days at least before the time fixed for the return of such citation, or by such other notice as the court may order.

MICHIGAN: Compiled Laws of 1897, Vol. I., p. 261, Part III. Chapter 29.

Section 465. After the entry and enrollment of any final decree affecting or determining the title to real estate, a copy of such decree duly certified by the register in chancery of the county in which the same was entered under the seal of the court may be received and recorded in the office of the register of deeds of the proper county, and shall have the same effect as the original decree; and if such decree shall direct the execution of a conveyance or other instrument affecting the title to real estate, the record of such certified copy shall have the same effect as the record of such conveyance or other instrument

affecting the title to real estate would have if duly executed pursuant to said decree.

Note: See Act 107 of 1895 relative to recording of decrees by registers of deeds. Sections 9044–9047.

[Compare also proceedings against persons concealed and non-resident defendants. Sections 485–501.]

MINNESOTA: Revised Laws of 1905.

Section 4391. The district court has power to pass the title to real estate by a judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgment into effect; and such judgment, being recorded in the proper registry of deeds, while in force, shall be as effectual to transfer such title as the deed of the defendant.

MISSISSIPPI: Code of 1906. Chapter 19, Chancery Courts.

Section 644. The decree of a court of chancery shall have the force, operation, and effect of a judgment at law in the circuit court.

Section 645. When a decree shall be made for a conveyance, release, or acquittance, or other writing and the party against whom the decree is made shall not comply therewith, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and shall be as available as if the conveyance, release, or acquittance, or other writing had been executed in conformity to the decree; or the court may appoint a commissioner to execute such writing, which shall have the same effect as if executed by the party.

(Compare also Section 646, saving the rights of infants.)

NEBRASKA: Cobbey's Annotated Statutes, Vol. I, 1909.

Section 1416. That when any judgment or decree shall be rendered for a conveyance, release, or acquittance, in any court of this state, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformable to such judgment or decree.

Section 1441. Real property may be conveyed by master commissioners as hereinafter provided: FIRST — When by an order or judgment in an action or proceeding, a party is ordered to convey such

property to another, and he shall neglect or refuse to comply with such order or judgment. SECOND — When specific real property is required to be sold under an order or judgment of the court.

Section 1442. A sheriff may act as a master commissioner under the second subdivision of the preceding section. Sales made under the same shall conform in all respects to the laws regulating sales of land upon execution.

Section 1443. The deed of a master commissioner shall contain the like recital and shall be executed, acknowledged and recorded, as the deed of a sheriff, of real property sold under execution.

NEVADA: Cutting's Compiled Laws, 1900.

Section 3311. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same and his obedience thereto enforced.

Section 3240. When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

NEW HAMPSHIRE: Public Statutes, 1901. Chapter 205.

Section 15. If the decree or order requires the performance of any other thing than the payment of money, the court may make necessary orders and issue necessary process to secure, or compel the performance of the decree or order by means of the property attached or held by trustee process. (1866, Section 4227, sub-section 4.)

NEW JERSEY: General Statutes, 1895, p. 383, Chancery Act.

Section 63. That where a decree of the court of chancery shall be made for a conveyance, release, or acquittance of lands, or any interest therein and the party against whom the said decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and be as available as if the conveyance, release, or acquittance had been executed conformably to such decree and this notwithstanding any disability of such party by infancy, lunacy, coverture, or otherwise. (Public Laws, 1852, p. 256.)

NEW MEXICO: Compiled Laws, 1897.

Section 2878. It shall be the duty of the judge of any court to cause judgment, sentence, or decree of the court to be carried into effect according to law.

NEW YORK: Bliss's New York Annotated Code, 6th ed. Vol. I, Code of Civil Procedure.

Section 717. Where it is admitted by the pleading or examination of a party that he has in his possession or under his control money or other personal property capable of delivery which being the subject of the action or special proceeding is held by him as trustee for another party, or which belongs, or is due to another party, the court may in its discretion grant an order upon notice that it be paid into or deposited in court or delivered to that party, with or without security subject to the further direction of the court.

Section 718. Where the court has directed a deposit or delivery as prescribed in the last section, or where a judgment directs a party to make a deposit or delivery or to convey real property; if the direction is disobeyed, the court besides punishing the disobedience as a contempt, may by order require the sheriff to take and deposit or deliver the money or other personal property or to convey the real property in conformity with the direction of the court.

NORTH CAROLINA: Clark's Code of Civil Procedure, 3d ed.

Section 426. In any action wherein the court shall declare that a party is entitled to the possession of property, real or personal, the legal title whereof may be in another or others, parties to the suit, and the court shall order a conveyance of such legal title to him so declared to be entitled, or where for any cause, the court shall order that one of the parties holding property in trust shall convey the legal title therein to be held in trust to another person, although not a party, the court after declaring the right, and ordering the conveyance, shall have power, also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made, the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered was in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as may be adjudged to attend the conveyance, in the same manner and to the same extent as the con-

veyance would if the same were executed according to the order. And any party taking benefit under the judgment may have the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed. R. C., c. 32, Section 24. 1850, c. 107, Section 1.

Section 427. Every judgment in which the transfer of title shall be so declared shall be regarded as a deed of conveyance, executed in due form and by capable persons notwithstanding the want of capacity in any person ordered to convey and shall be registered in the proper county under the same rules and regulations as may be prescribed for conveyances of similar property executed by the party; and all laws which may be passed for extending the time for registration of deeds shall be deemed to include such judgments provided the conveyance, if actually executed, would be so included.

NORTH DAKOTA: Revised Codes, 1905.

Section 7077. In all actions arising under chapter 31 of this code and in actions commenced for the satisfaction of record of mortgages or other liens upon real property or for the specific performance of contracts relating to real property the court may by its judgment without any act on the part of the defendant transfer the title to real property and remove or discharge a cloud or incumbrance thereon, and a certified copy of such judgment may be recorded in the office of the register of deeds of the county in which the property affected is situated.

OHIO: General Code, 1910, Vol. III.

Section 11590. When the party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect and be as available as if the conveyance, release, or acquittance had been executed conformably thereto.

OKLAHOMA: General Statutes, 1908.

Section 5412. Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record and recorded in the office of the register of deeds with like effect as a deed duly executed and acknowledged.

Section 5192. When a judgment shall be rendered for a conveyance, release or acquittance, in any court of this State, and the party against whom the judgment shall be rendered does not comply there-

with by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such judgment; or the court may order such conveyance, release or acquittance to be executed in the first instance by the sheriff; and such conveyance, release or acquittance, so executed, shall have the same effect as if executed by the party against whom the judgment was rendered. This section shall apply to decrees rendered or to be rendered in suits now pending.

OREGON: Lord's Oregon Laws, 1910, Vol. I.

Section 414. A decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party do not comply therewith, be deemed and taken to be equivalent thereto. The court or judge thereof may enforce an order or decree in a suit, other than for the payment of money, by punishing the party refusing or neglecting to comply therewith, as for a contempt.

Section 415. The provisions of section 213 to section 220, inclusive and section 227 to section 258, inclusive, of this Code, shall apply to the enforcement of decree so far as the nature of the decree may require or admit of it; but the mode of trial of an issue of fact in a proceeding against a garnishee shall be according to the mode of trial of such issue in a suit.

PENNSYLVANIA: Purdon's Digest, Vol. I, 13th ed., page 1150 Of Deeds, section 19. Public Laws, Chapter 83, April 10, 1901.

Section 1. In any proceedings at law or in equity in any of the courts of this commonwealth having jurisdiction, if the said court shall order a conveyance to be executed by either of the parties to the said proceeding of his or her interest in any lands or tenements to any other party or person, and the party so ordered shall neglect or refuse to comply with said order and make the said conveyance or shall die, flee the jurisdiction or become insane without having complied therewith, it shall be lawful for the said court to order and direct that such conveyance be made by the sheriff, prothonotary, or clerk, or by a trustee specially appointed for that purpose; and the said conveyance having been duly executed by the said sheriff, prothonotary, clerk, or trustee, and acknowledged in open court shall be good and effective to convey the interest of the recusant, neglecting, deceased, persons fleeing the jurisdiction, or insane party, to the extent ordered by the court, the same as if it had been duly executed and delivered by such party per-

sonally: Provided, that this shall not prevent the said court from punishing the contempt of the said party by fine and imprisonment, if deemed necessary: Provided, further, that no such order shall be made in case of the decease of such party until notice shall have been given to his or her heirs and legal representatives by process duly served, if resident within the commonwealth, or, if not, by publication and copy mailed to the last known address of the same according as the court shall order and direct.

RHODE ISLAND: General Laws, 1909, page 1018. Chapter 289, Practice in Equity Causes.

Section 23. Whenever the superior court shall decree, or shall have decreed, a conveyance of any real or personal estate, or of any right or interest therein, in any suit in equity, the court may direct the master in chancery to whom the cause shall be or shall have been referred, or before whom it shall be pending, to make, execute, acknowledge, and deliver such conveyance; and any conveyance made by any master under and according to such decree shall be effectual to pass the title to the estate conveyed and in the decree described.

SOUTH CAROLINA: Code of Civil Procedure. Code of Laws, Vol. II, 1912.

Section 343. Where a judgment requires the payment of money or the delivery of real or personal property the same may be enforced in those respects by execution as hereafter provided in this title. Where it requires the performance of any other act a certified copy of the judgment may be served on the party against whom it is given or the person or officer who is required thereby or by law to obey the same and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

SOUTH DAKOTA: Revised Codes, 1903. Hipple's Ed. Code of Civil Procedure.

Section 691. In all actions arising under chapter 29 of the Code of Civil Procedure of this State and in actions brought for the satisfaction of record of mortgages and other liens upon real property whenever the defendant is not found within the jurisdiction of the court and service of summons therein is made upon such defendant by publication or whenever any defendant in such action refuses or neglects to make a conveyance or cancel an incumbrance pursuant to the judgment of the court, the court shall have power by its judgment to determine and

establish the title to the property in question, to annul, cancel, and remove any and all conveyances and incumbrances constituting a cloud upon such title and whenever a conveyance of such property is directed to be made by such judgment and likewise in actions for the specific performance of contracts relating to real property in this state, whenever the defendant is not found within the jurisdiction of the court and service of summons therein is made on such defendant by publication or whenever any defendant in such action refuses or neglects to convey the property involved in the suit pursuant to the judgment of the court, this shall be done in behalf of such defendant by a trustee appointed by the court for that purpose.

TENNESSEE: Shannon's Code, 1896.

Section 6301. The decree may divest the title to property, real or personal, out of any of the parties and vest it in others and such decree shall have all the force and effect of a conveyance by such parties, executed in due form of law.

Section 6302. The court may also appoint a commissioner to execute all necessary conveyances, releases and acquittances either in his name or in the name of the parties as the court may think proper; and the instrument so executed will be as valid as if executed by the party.

Section 6303. If a decree direct a conveyance, release or acquittance to be made and the party against whom the decree is rendered fails or refuses to execute the same in the time specified in the decree or in a reasonable time if no particular time is thus specified, the decree operates in all respects as if the conveyance, release or acquittance was made.

Section 6304. If the court see proper in the first instance or if upon issuance of the attachment the delinquent cannot be found, a writ of sequestration may issue against the estate of such delinquent to compel obedience to the decree.

Section 6305. Courts of chancery are further authorized to issue such process, mesne and final, as has been used in such courts and all writs for the collection of money or to obtain possession of real or personal property in use in the common law courts, may be adapted to the execution of decrees in the courts of chancery.

TEXAS: Sayles, Texas Civil Statutes, 1897, Vol. I. On Judgments.

Section 1338. Where the judgment is for the conveyance of real estate or for the delivery of personal property, the decree may pass title to such property without any act to be done on the part of the party against whom the judgment is rendered.

Section 1339. The court shall cause its judgments and decrees to be carried into execution; and where the judgment is for personal property and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff and the court may in addition to the other relief granted in such case enforce its judgment by attachment, fine and imprisonment.

UTAH: Compiled Laws, 1907. Civil Procedure. Chapter 42.

Section 3279. When the judgment requires the person against whom it is rendered to execute and deliver to any other person a conveyance of any specific real property, and the person against whom it is rendered shall refuse or neglect to execute and deliver said conveyance for five days after the service upon him of a certified copy of such judgment, or if he is absent or concealed, so that service of such certified copy cannot be had, upon proof satisfactory to the court that such service has been made, or that it cannot be made by reason of such absence or concealment, the person entitled to the conveyance may obtain from the court an order that the certified copy of the judgment, together with the order, be recorded by the recorder of deeds of the county where the real property is situated; and when recorded, it shall give to the person entitled to such conveyance a right to the possession of the real property described in the judgment, and to hold the same according to the terms of the conveyance ordered, in like manner as if it had been conveyed in pursuance of the judgment. The recording of any judgment as above provided shall not prevent the court rendering such judgment from enforcing the same by any proper process, according to the course of proceedings therein.

VERMONT: Public Statutes, 1906. Chapter 65, Court of Chancery.

Section 1302. The court of chancery may enforce performance of a decree, or obedience thereto, by execution against the body of the party against whom such decree is made, or against his goods, chattels, or estate, and, for want thereof, his body, according to the nature of the case.

Section 1303. When a decree is made to foreclose the right in equity of redeeming mortgaged premises, if the premises are not redeemed agreeably to the decree, the clerk of the court may issue a writ of possession, to be executed like, and have the same effect as, similar writs issued by a court of law after judgment in an action of ejectment.

Section 1304. In the foreclosure of the equity of redemption in lands, either at law or in chancery, where the time of redemption has expired, the party procuring such foreclosure shall cause to be recorded in the office of the clerk of the town where the land lies, within thirty days after the expiration of the time of redemption, a certified copy of the record, if such foreclosure is at law, or the decree of such foreclosure, or a certified copy thereof, if it is in chancery. If such lands lie in an unorganized town or gore, the record required by this section shall be made in the office of the clerk of the county in which the lands lie.

Section 1305. Such foreclosure shall not transfer the title to such lands as against subsequent purchasers, mortgagees or attaching creditors, unless such copy of record or such decree or copy thereof is thus left for record, or is afterwards, and prior to the acquiring of any interest in, or lien on, the lands by a purchaser, mortgagee or attaching creditor, left for record in like manner; and, if not thus left for record, such lands shall be subject to redemption by subsequent purchasers, mortgagees or attaching creditors, as though the time of redemption had not expired.

Section 1306. When a decree is made by a court of chancery for a conveyance, release or acquittance, and the party against whom the decree is made does not comply therewith by the time appointed, the decree shall be held to have the same effect as if the conveyance, release or acquittance had been executed agreeably to such decree. But such decree shall not be deemed a conveyance of real estate, unless a copy of same, certified by the clerk of the court, is recorded in the office in which a deed of such real estate is required by law to be recorded.

VIRGINIA: Pollard's Virginia Code, 1904.

Section 3418. A court of equity, in a suit wherein it is proper to decree, or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of

the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it.

(Cf. also 3418a–3423.)

WASHINGTON: Remington and Ballinger's Codes and Statutes, 1910. Vol. I. Title IV. The Enforcement of Judgments. Chapter VI.

Section 605. The several superior courts may, whenever it is necessary, appoint a commissioner to convey real estate, —

1. When, by a judgment in an action, a party is ordered to convey real property to another, or any interest therein;

2. When real property, or any interest therein, has been sold under a special order of the court, and the purchase money paid therefor.

Section 606. The deed of the commissioner shall so refer to the judgment authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally.

Section 607. A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

Section 612. In case of a judgment to compel a party to execute a conveyance of real estate, the court may enforce the judgment by attachment or sequestration, or appoint a commissioner to make the conveyance.

WEST VIRGINIA: Code of 1906. Chapter 132, Decrees of sale, etc.

Section 3999. A court of law or equity, in a suit in which it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same and had executed it.

WISCONSIN: Statutes (consolidated) 1911. Chapter 127.

Section 2794. Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery or conveyance of money or other property and the order is disobeyed, the court besides punishing the disobedience as for contempt may make an order requiring the sheriff to take the money or property and deliver, deposit or convey it in conformity with the direction of the court, or the court may pass title to real estate by its judgment, without conveyance. (1856, Chapter 120, Section 155.)

WYOMING: Compiled Statutes, 1910.

Section 4614. When the party against whom a judgment for a conveyance, release or acquittance is rendered does not comply therewith by the time appointed such judgment shall have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to such judgment.

ENGLAND: 11 Geo. IV. & 1 Will. IV. Chapter 36.

An Act for altering and amending the Law regarding Commitments by Courts of Equity for Contempts, and the taking Bills *pro Confesso*.

Section XV. That when any Person shall have been directed by any Decree or Order to execute any Deed or other Instrument, or make a Surrender or Transfer, or to levy a Fine, or suffer a Recovery, and shall have refused or neglected to execute, make, or transfer, or levy or suffer the same, and shall have been committed to Prison under Process for such Contempt, or, being confined in Prison for any other Cause, shall have been charged with or detained under Process for such Contempt, and shall remain in such Prison, the Court may, upon Motion or Petition, and upon Affidavit that such Person has, after the Expiration of Two Calendar Months from the Time of his being committed under, or charged with, or detained under such Process, again refuse to execute such deed or Instrument, or make such Surrender or Transfer, or levy or suffer such Fine or Recovery, order or appoint One of the Masters in Ordinary, or if the Act is to be done out of London, then, if necessary, One of the Masters Extraordinary, to execute such Deed, or other Instrument, or to make such Surrender or Transfer, for and in the Name of such Person, and to levy such Fine or suffer such Recovery in his name, and to do all Acts necessary to give Validity and Operation to such Fine and Recovery, and to lead or declare the Uses thereof; and the Execution of the said Deed or other Instrument, and the Surrender or Transfer made by the said Master, and the Fine or Recovery levied or suffered by him, shall in all respects have the same Force and Validity as if the same had been executed or made, levied or suffered, by the Party himself; and within Ten Days after the Execution or making of any such Deed or other Instrument, or Surrender or Transfer, or levying or suffering such Fine or Recovery, Notice thereof shall be given by the adverse Solicitor to the Party in whose Name the same is executed or made; and such Party, as soon as the Deed or other Instrument, or Surrender, Transfer, Fine, or Recovery shall be executed, made, levied, or suffered, shall be considered as having cleared his Contempt, except as far as regards the Payment of the

Costs of the Contempt, and shall be entitled to be discharged therefrom under any of the Provisions of this Act applicable to his Case; and the Court shall make such Order as shall be just, touching the payment of the Costs of or attending any such Deed, Surrender, Instrument, Transfer, Fine, or Recovery.

Section XV, 16. That where a Person shall be committed for a Contempt in not delivering to any Person or Persons or depositing in Court or elsewhere, as by any Order may be directed, Books, Papers, or any other Articles or Things, any Sequestrator or Sequestrators appointed under any Commission of Sequestration shall have the same Power to seize and take such Books, Papers, Writings, or other Articles or Things, being in the Custody or Power of the Person against whom the Sequestration issues, as they would have over his own Property; and thereupon such Articles or Things so seized and taken shall be dealt with by the Court as shall be just; and after such Seizure it shall be lawful for the Court upon the Application of the Prisoner, or of any other Person in the Cause or Matter, or upon any Report to be made in pursuance of this Act, to make such Order for the Discharge of the Prisoner, upon such Terms, and, if it shall see fit, making any Costs in the Cause, as to the Court shall seem proper.

ENGLAND: 11 Geo. IV. & 1 Will. IV. Chapter 60.

An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees; and for enabling Courts of Equity to give Effect to their Decrees and Orders in certain Cases.

Section III. And be it further enacted, That where any Person seised or possessed of any Land upon any Trust or by way of Mortgage shall be lunatic, it shall be lawful for the Committee of the Estate of such Person, by the Direction of the Lord Chancellor of Great Britain, being intrusted by virtue of the King's Sign Manual with the Care and Commitment of the Custody of the Persons and Estates of Persons found idiot, lunatic, or of unsound Mind, to convey such Land, in the Place of such Trustee or Mortgagee, to such Person and in such Manner as the said Lord Chancellor shall think proper; and every such Conveyance shall be as effectual as if the Trustee or Mortgagee, being lunatic, had been of sane Mind, Memory, and Understanding, and had made and executed the same.

Section VIII. And be it further enacted, That where any Person seised of any Land upon any Trust shall be out of the Jurisdiction of or not amenable to the Process of the Court of Chancery, or it shall be

uncertain, where there were several Trustees, which of them was the Survivor, or it shall be uncertain whether the Trustee last known to have been seised as aforesaid be living or dead, or, if known to be dead, it shall not be known who is his Heir; or if any Trustee seised as aforesaid, or the Heir of any such Trustee, shall neglect or refuse to convey such Land for the Space of Twenty-eight Days next after a proper Deed for making such Conveyance shall have been tendered for his Execution by, or by an Agent duly authorized by, any Person entitled to require the same; then and in every or any such Case it shall be lawful for the said Court of Chancery to direct any Person whom such Court may think proper to appoint for that Purpose, in the Place of the Trustee or Heir, to convey such Land to such Person and in such Manner as the said Court shall think proper; and every such Conveyance shall be as effectual as if the Trustees seised as aforesaid, or his Heir, had made and executed the same.

ENGLAND: 13 & 14 Victoria, Chapter 60.

An Act to Consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.

Section III. And be it enacted, That when any Lunatic or Person of unsound Mind shall be seised or possessed of any Lands upon any Trust or by way of Mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's Sign Manual with the Care of the Persons and Estates of Lunatics, to make an Order that such Lands be vested in such Person or Persons in such Manner and for such Estate as he shall direct; and the Order shall have the same Effect as if the Trustee or Mortgagee had been sane, and had duly executed a Conveyance or Assignment of the Lands in the same Manner for the same Estate.

Section XX. And be it enacted, That in every Case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the Provisions of this Act, be enabled to make an Order having the Effect of a Conveyance or Assignment of any Lands, or having the Effect of a Release or Disposition of the contingent Right of any Person or Persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the Case may be, should it be deemed more convenient, to make an Order appointing a Person to convey or assign such Lands, or release or dispose of such contingent Right; and the Conveyance or Assignment, or Release or Disposition, of the Person so appointed, shall,

when in conformity with the Terms of the Order by which he is appointed, have the same effect, in conveying or assigning the Lands, or releasing or disposing of the contingent Right, as an Order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular Case have had under the Provisions of this Act; and in every Case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall under the Provisions of this Act be enabled to make an Order vesting in any Person or Persons the Right to transfer any Stock transferable in the Books of the Governor and Company of the Bank of England, or of any other Company or Society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an Order directing the Secretary, Deputy Secretary, or Accountant General for the Time being of the Governor and Company of the Bank of England, or any Officer of such other Company or Society, at once to transfer or join in transferring the Stock to the Person or Persons to be named in the Order; and this Act shall be a full and complete Indemnity and Discharge to the Governor and Company of the Bank of England, and all other Companies or Societies, and their Officers and Servants, for all Acts done or permitted to be done pursuant thereto.

ENGLAND: 15 & 16 Victoria, Chapter 55.

An Act to extend the Provisions of "The Trustee Act, 1850."

Section I. That when any Decree or Order shall have been made by any Court of Equity directing the Sale of any Lands for any Purpose whatever, every Person seised or possessed of such Land, or entitled to a contingent Right therein, being a Party to the Suit or Proceeding in which such Decree or Order shall have been made, and bound thereby, or being otherwise bound by such Decree or Order, shall be deemed to be so seised or possessed or entitled (as the Case may be) upon a Trust within the Meaning of the Trustee Act, 1850; and in every such Case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the Purpose of carrying such Sale into effect, to make an Order vesting such Lands or any Part thereof, for such Estate as the Court shall think fit, either in any Purchaser or in such other Person as the Court shall direct; and every such Order shall have the same Effect as if such Person so seised or possessed or entitled had been free from all Disability, and had duly executed all proper Conveyances and Assignments of such Lands for such Estate.

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